MISSISSIPPI SUPREME COURT UPDATE

2015 Fall Public Defenders Training Conference
April 16, 2015 - October 1, 2015

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MISSISSIPPI COURT OF APPEALS UPDATE
2015 Fall Training Conference
April 14, 2015 – September 29, 2015

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MISSISSIPPI SUPREME COURT DECISIONS
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DEATH PENALTY CASES:

April 23, 2015

Ricky Chase v. State, No. 2013-CA-01089-SCT (Miss. April 23, 2015)

CASE: PCR – Capital Murder
SENTENCE: Death

COURT: Copiah County Circuit Court
TRIAL JUDGE: Hon. Lamar Pickard
TRIAL COURT ATTORNEYS: James W. Craig, Cynthia Ann Stewart, Marvin L. White, Jr.

APPELLANT ATTORNEY: James W. Craig
APPELLEE ATTORNEY: Marvin L. White, Jr., Jason L. Davis

DISPOSITION: Denial of PCR Affirmed. Chandler, Justice, for the Court. Randolph, P.J., Lamar, Pierce and Coleman, JJ., Concur. Dickinson, P.J., Dissents with Separate Written Opinion Joined by Waller, C.J., and King, J. Kitchens, J., Not Participating.

ISSUES: (1) Whether the circuit court committed errors of fact and law in finding that Chase had not proven significantly subaverage intellectual functioning; (2) whether the circuit court committed errors of fact and law in finding that Chase had not proven significant deficits in adaptive functioning; and (3) whether the circuit court erred by denying Chase's motion for reconsideration without an evidentiary hearing to assess the credibility of those interviewed by Dr. Daniel Reschly.

FACTS: On August 14, 1989, Ricky Chase, along with Robert Washington, went to the home of Doris and Elmer Hart. Chase and Washington tied Mrs. Hart up and began to search the house for valuables. When Mr. Hart arrived home, Chase and Washington hid in the bathroom. His wife was able to alert him to the situation and he went back to his car to retrieve a gun. He then returned to the house and began to untie his wife. As Hart bent over his wife, Ricky Chase stepped out of the bathroom and shot him. Chase then went through Hart's pockets and ordered Washington to get the guns. Chase and Washington were later arrested, both giving statements alleging the other shot Hart. Washington pled guilty and testified against Chase. Chase's conviction and sentence were affirmed on direct appeal. His first PCR was denied in 1997. His request for federal habeas relief was denied in 2001. Chase then filed a successive PCR claiming mental retardation as defined by *Atkins v. Virginia*, 536 U.S. 304 (2002). The SCT granted an evidentiary hearing to determine if Chase met the definition of mental retardation within the meaning of *Atkins*. *Chase v. State*, 873 So. 2d 1013 (Miss. 2004). A hearing was held in 2010, but the circuit court denied relief. A corrected finding of facts was filed in 2013. Chase appealed.

HELD: The SCT recognized the need to update the definitions previously established to determine mental retardation. "Mental retardation" has been replaced with "intellectual disability."

> We find that judicial recognition of the new terminology conforms with the directives of *Atkins* and *Hall* [*v. Florida*, 134 S. Ct. 1986 (2014)], and will facilitate legal determinations of intellectual disability by allowing our courts to rely on the newer, generally-accepted definitions most frequently used by modern clinicians. We now adopt the 2010 AAIDD [American Association on Intellectual and Developmental Disability, formerly the American Association on Mental Retardation] and 2013 APA [American Psychiatric Association] definitions of intellectual disability as appropriate for use to determine intellectual disability in the courts of this state in addition to the definitions promulgated in *Atkins* and *Chase*.

(1) The circuit court's findings that Chase did not prove by a preponderance of the evidence that he is intellectually disabled under *Atkins* was not clearly erroneous. Although Chase had subaverage intellectual functioning, the circuit court found that Chase did not have significantly subaverage intellectual functioning. The court relied on the State Hospital's testing of his IQ at 71. The SCT determined Chase did prove significant subaverage intellectual functioning.

(2) Regardless, Chase failed to show significant deficits in adaptive functioning. The circuit court relied on Dr. Gil Macvaugh's opinion that Chase lacked significant deficits in any area of adaptive functioning, rather than the opinions of Dr. Daniel Reschly and Dr. Gerald O'Brien. Although the court did err in finding that Dr. Reschly used no methodology to assure the credibility of the interview sources, the primary reason it found Dr. Reschly's opinions unpersuasive was that Dr. Reschly relied on his own personal opinions and moral judgments rather than on science.

> We reject Chase's invitation to enact a rule that a circuit court must blindly accept a psychologist's interpretation of witnesses' answers to interview questions as dispositive of the adaptive functioning prong of the test for intellectual disability. We hold that the circuit court was entitled to evaluate the scientific validity and credibility of Dr. Reschly's opinions and to reject them if it found them not credible.

The Court also found problems with Dr. Macvaugh's opinions. None of the experts in this case conducted nearly the depth of investigation appropriate for assessing intellectual disability for the purposes of *Atkins*. Nonetheless, the burden of proof rested with Chase.

(3) Chase timely filed a motion for reconsideration raising numerous issues, but specifically asking the court to reopen the hearing and take additional testimony from third parties interviewed by Dr. Reschly (witnesses Dr. Macvaugh could not contact), and make new findings of fact and conclusions of law. Dr. Macvaugh testified that, while he would have preferred to conduct interviews, he had sufficient information with which to reach a conclusion on the question of whether Chase was intellectually disabled. Dr. Macvaugh believed his evaluation of Chase to be complete, and there is no indication that hearing testimony from the third parties would have caused Dr. Macvaugh to revisit his opinions. The trial judge did not abuse his discretion in denying reconsideration.

Dickinson, Presiding Justice, Dissenting:

Justice Dickinson dissented, finding the Court's existing *Atkins* standard and procedures are inadequate to alleviate the Eighth Amendment concerns in death penalty cases. Dr. Reschly relied

on interviews with family and friends just as the Court in previous cases instructed him to do. "In sum, the circuit judge discredited Dr. Reschly's testimony wholesale, largely because Dr. Reschly relied on sources of information that this Court has found important in *Atkins* evaluations. That was legal error." Justice Dickinson also believed Chase met his burden of proving intellectual disability, showing both subaverage intellectual functioning and two or more adaptive functioning deficits.

> This system is arbitrary on its face, and we should consider a judicial definition of intellectual disability that meets constitutional concerns. Our approach should be to exclude from the death penalty only those who raise true constitutional concerns, rather than those who meet the mental health community's views of what it means to be intellectually disabled for their diagnostic purposes.

To read the full opinion, click here:
http://courts.ms.gov/Images/Opinions/CO103460.pdf

May 7, 2015

Timothy Robert Ronk v. State, No. 2011-DP-00410-SCT (Miss. May 7, 2015)

CASE: Capital Murder and Armed Robbery
SENTENCE: Death plus 30 years for the robbery

COURT: Harrison County Circuit Court
TRIAL JUDGE: Hon. Lisa P. Dodson
TRIAL ATTORNEYS: Gordon Eric Geiss, Christopher L. Schmidt

APPELLANT ATTORNEY: Alison R. Steiner, Justin T. Cook
APPELLEE ATTORNEY: Melanie Dotson Thomas, Jason L. Davis, Marvin L. White, Jr., Cameron L. Benton, Brad A. Smith, John R. Henry, Jr.
DISTRICT ATTORNEY: Joel Smith

DISPOSITION: Affirmed. Waller, Chief Justice, for the Court. Randolph, P.J., Lamar, Chandler, Pierce and Coleman, JJ., Concur. Kitchens, J., Specially Concurs with Separate Written Opinion Joined by Dickinson, P.J. Dickinson, P.j., Concurs in Part and in Result with Separate Written Opinion Joined by King, J.

ISSUES: (1) Whether the trial court erred in denying his imperfect-self-defense instruction, in giving the State's arson instruction, and in giving a one-continuous-transaction instruction during the guilt phase of trial; (2) whether the verdict was supported by sufficient evidence; (3) whether Ronk received ineffective assistance of counsel during the sentencing phase of trial; (4) whether the trial court failed to sequester the jury properly; (5) whether inadmissible evidence was allowed into trial; (6) whether the State overcompensated Heather Hindall for her trial testimony; (7) whether the trial court properly instructed the jury during the sentencing phase of trial; (8) whether Ronk's death sentence is unconstitutional; (9) whether the death sentence is disproportionate to the crime; (10) whether any error can be considered harmless; (11) whether the cumulative effect of all errors mandates reversal or a new trial.

FACTS: On the morning of August 26, 2008, emergency personnel responded to a house fire in Biloxi. Firefighters discovered the remains of 37-year-old Michelle Lynn Craite. Craite's autopsy revealed multiple stab wounds to her back in addition to severe burns that destroyed her flesh down to the bone. Investigators determined the fire to be arson. Craite had moved to Mississippi from Michigan in 2008 and had been in a relationship with Timothy Ronk. Ronk had been living with Craite at the time of the fire. Someone had used Craite's debit card on the morning of her death, and had purchased jewelry at a Walmart. Jennifer Mitchell, the manager of the D'Iberville Walmart, confirmed that she had assisted a man with the purchase of a diamond ring. Mitchell positively identified Ronk as the man who had purchased the ring from surveillance photos. Phone records indicated several calls to Heather Hindall, a resident of Middlesburg, Florida. Ronk was subsequently arrested with Hindall in Florida. Hindall told investigators she had developed an online relationship with Ronk some time in July of 2008, while he was living with Craite. Hindall believed that he planned to move to Florida to marry her. After he was arrested, Ronk told Hindall that he and Craite had gotten into an argument when he attempted to leave for Florida, and Craite had tried to attack him with a knife. He told Hindall that he had disarmed Craite and stabbed her when she threatened to get a shotgun and kill him. Then, Ronk "poured gasoline over everything and lit it on fire and jumped in his truck and took off, and he told me that he had threw [sic] the knife over the bay bridge before he got to me." Ronk later confirmed this story in a letter he wrote to Hindall from prison. No weapons were found inside Craite's house. However, the police did find two unloaded shotguns stored in their cases in a studio apartment behind Craite's house. Ronk was convicted and sentenced to death.

HELD: (1) Ronk was not entitled to an instruction on imperfect-self-defense manslaughter. If the jury found that Craite's death occurred while Ronk was engaged in the commission of an arson, the fact that the killing was a manslaughter rather than a murder would have no effect on his guilt under §97-3-19(2)(e). Ronk did not offer a defense to the underlying felony of arson. No evidence was presented which would have allowed the jury to separate the killing from the arson and convict Ronk only of manslaughter.

Ronk sought a jury instruction on deliberate-design murder under the theory that the arson and the killing were distinct and unrelated crimes. Concerned that Ronk would escape punishment for the admitted arson if the jury returned a verdict finding him guilty of only simple murder, the State asked for and was granted a lesser-offense instruction on arson. The defense eventually agreed to a combined instruction on both. On appeal, Ronk argued that the trial court erred in granting the arson instruction because arson is not a lesser-included offense of capital murder. The issue is procedurally barred and is without merit. Because the jury convicted Ronk of capital murder, any alleged error in instructing the jury separately on arson would be harmless beyond a reasonable doubt.

The trial court did not err in instructing the jury on the one-continuous-transaction doctrine. The instruction was a correct statement of the law governing capital felony-murder cases.

(2) Ronk challenged the sufficiency of the evidence to prove that he killed Craite while engaged in the commission of an arson. He argued that, because he did not intend to commit an arson at the time he stabbed Craite, the evidence presented to the jury does not support a capital-murder conviction. The evidence was sufficient for capital murder with the underlying felony of arson. Ronk admitted to pouring gasoline throughout Craite's house and setting it on fire after stabbing her multiple times,

leaving her incapacitated. The pathologist offered substantial evidence indicating Craite was still alive at the time of the fire, but was unable to escape due to her stab wounds.

(3) Ronk alleged several instances of ineffective assistance. However, the Court found that the claims are not based on facts fully apparent from the record. Ronk is free to raise the issue again on PCR.

(4) After the parties selected the final jury panel, the court allowed the entire panel to go home for the evening without announcing the 12 jurors and 2 alternates who were chosen. They were instructed not to talk about the case or watch any news coverage. The defense did not object to this. Accordingly, Ronk's claim that the jury was not properly sequestered is procedurally barred. The claim is also without merit. The circuit court's procedure did not violate URCCC 10.2. The jurors were sequestered during the entire trial.

(5) Ronk claims that the trial court erred in limiting Heather Hindall's testimony regarding Ronk's statements to her about Craite. Ronk refers to "additional statements" that he sought to admit into evidence, but no "additional statements" were ever offered by Ronk during Hindall's cross-examination. It is clear from the record that his attorney intended to question Hindall only about the phone conversation in question, and the trial court allowed Hindall to give that testimony.

Ronk argues that the trial court erred in admitting a knife found in Ronk's car. Hindall testified that Ronk told her that he had thrown the knife he had used to stab Craite "over the bay bridge" on his way to Florida. Hindall stated that she had observed a knife in Ronk's vehicle when he arrived in Florida. The pathologist, Dr. Paul McGarry testified that Craite had suffered multiple stab wounds along her lower back prior to her death, and the knife found in Ronk's car was consistent with the type of knife that inflicted the wounds. McGarry's testimony supported the knife's admissibility. Since Ronk admitted to stabbing Craite with a knife, the knife's probative value is not outweighed by any arguable prejudicial effect.

Ronk argues that the admission of Craite's bank records violated his right to confront the witnesses against him. However, Ronk did not object to the records at trial. The admission was not plain error. Craite's bank statements did not directly implicate Ronk in Craite's murder, but they helped explain the investigation of Craite's death. The bank statements corroborated Ronk's own admissions that he used Craite's money to buy Hindall a ring and to escape to Florida. The admission of the records was harmless beyond a reasonable doubt.

Ronk argued that the trial court erred in allowing Mitchell, the Walmart employee who sold Ronk a diamond ring, to testify regarding her out-of-court identification of Ronk. Again, Ronk did not object to the identification at trial and the claim is barred. Regardless, Mitchell's pretrial identification of Ronk was reliable. Mitchell had ample opportunity to view Ronk as she assisted him with the purchase of a diamond ring. Mitchell's pretrial identification of Ronk were not so unduly suggestive as to give rise to a substantial likelihood of an irreparable misidentification.

Ronk argues that the State presented impermissibly inflammatory evidence regarding Craite's injuries at various stages of the trial. However, the prosecutor properly commented on Craite's pain during closing arguments. Ronk never objected to testimony that Craite suffered pain. The claim is barred.

Regardless, the evidence was relevant, as part of Ronk's theory of defense was that Craite was already dead when he set her house on fire.

(6) Hindall was required to travel from Florida and stay in Gulfport for three nights to testify at Ronk's trial. The State directly paid Hindall only $105.00 for travel expenses. Ronk claims that the State overpaid Hindall for her testimony and concealed it from the defense. The claim is barred as it was not raised at trial. Regardless, the claim is without merit. According to Ronk, Hindall should have been paid $126. There were other payments made on her behalf to third-party vendors (travel agent and hotels), but Ronk offered no authority suggesting that direct payments to vendors violate §99-9-33. There was no evidence indicating the payment influenced Hindall's testimony in any way.

(7) Ronk was granted a catch-all mitigation instruction. Ronk did not request specific instructions on any of the statutory mitigating circumstances. His sentencing hearing was not fundamentally unfair because the trial court failed to instruct the jury on specific statutory mitigating circumstances.

There was not error denying instructions which informed the jury of its ability to sentence Ronk to life without parole even if it found no mitigating circumstances worthy of consideration. The instructions were improper mercy instructions.

There was no error denying an instruction which told the jury it had to find, beyond a reasonable doubt, that death by lethal injection was the appropriate punishment for the defendant. The method of execution is of no concern to the jury. The substance of the instruction was sufficiently covered by other instructions.

The trial court did not err in denying an instruction which would have informed the jury that, if it chose not to sentence Ronk to death, his sentence of life without parole would not be reduced or suspended, and he would never be eligible for parole. The parole issue should not be considered by the sentencing jury.

The trial court did not err in denying an instruction which informed the jury that the trial court would sentence Ronk to life imprisonment without parole if the jury was unable to agree unanimously on punishment. The instruction was cumulative.

Ronk failed to object to the State's instruction informing the jury that it should not be influenced by bias, sympathy, or prejudice. The claim is barred. The Court has repeatedly affirmed the use of this instruction.

The trial court did not err instructing the jury of the aggravating circumstance that the crime was committed during an arson. The claim that Craite was already dead at the time of the arson was previously rejected based on the evidence.

The trial court also did not err in instructing the jury on the especially heinous, atrocious and cruel aggravator. Dr. McGarry testified that Ronk's knife severed a major artery in Craite's chest, punctured both her lungs, and pierced her liver, filling her chest and abdominal cavities with blood. Craite was still alive and breathing during the fire; that she had suffered burning and blistering to the lining of her mouth, tongue, larynx, and windpipe; and that the fire had destroyed much of her flesh down to

the bone. Ronk poured gasoline in the bedroom where she lay incapacitated, evincing his intent to destroy her body. Craite would have been able to feel the pain of her body burning, but she was unable to escape due to her wounds. The instruction was not unconstitutionally vague.

(8) Ronk's death sentence did not violate the U.S. Constitution. As the Court has repeatedly held, the indictment did not need to include a *mens rea* element and did not need to list any statutory aggravating circumstances. The indictment did not violate *Apprendi v. New Jersey* or *Ring v. Arizona*. The jury found Ronk actually killed Craite, so his claim that §99-19-101(7) is unconstitutional because it contains *scienter* factor is without merit.

The State did not use robbery as an aggravating factor. He was separately charged with armed robbery. Arson was used both as the underlying felony during the guilt phase and an aggravating circumstance during the sentencing phase. This was proper.

Mississippi's lethal-injection procedure does not violate the constitutional prohibition against cruel and unusual punishment.

Ronk argued that §99-19-105 fails to provide for adequate or meaningful appellate review of death penalty cases in violation of the U.S. Constitution. "Mississippi's sentencing scheme includes numerous safeguards to ensure that the death penalty is not imposed arbitrarily or in a discriminatory manner, not the least of which is this Court's mandatory proportionality review."

(9) Ronk's death sentence was not disproportionate to his crime. The record includes no evidence that Ronk's sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor. There was sufficient evidence to support the aggravating factors.

(10) Errors can be harmless in death penalty trials. In this case, there were two arguable errors in Ronk's trial: the trial court's instruction on arson as a lesser-included offense of capital murder, and the admission of Craite's bank records. Because Ronk was convicted of the principal charge of capital murder, and not the lesser offense, this error had no effect on the jury's verdict. As to the bank records, Ronk failed to object.

(11) There was no cumulative error.

Kitchens, Justice, Specially Concurring:

Justice Kitchens concurred that the evidence did not support an imperfect self-defense instruction, but wrote of his concern of how imperfect self-defense in defined. He would go back to the "without reasonable cause" language. "I would abandon the "bona fide (but unfounded)" language found in *Wade* [*v. State*, 748 So. 2d 771, 775 (Miss. 1999)], an innovation which serves no good purpose and injects a basis for confusion where none previously existed." He also advocated for the abolition of the "one-continuous-transaction doctrine."

Dickinson, Presiding Justice, Concurring in Part and in Result:

Justice Dickinson wrote to express his concern with the "one-continuous-transaction doctrine." He believes the doctrine is a judicial amendment to the capital-murder statute.

> This statute clearly and unambiguously requires that the killing take place during a very specific time frame: while the person is "engaged in the commission of . . . arson," which is not the same as a killing that takes place *before* or *after* the commission of arson....The "one-continuous-transaction" theory is pure, made-up fiction, and I decline to subscribe to it.

To read the full opinion, click here:
http://courts.ms.gov/Images/Opinions/CO103102.pdf

David Dickerson v. State, No. 2012-DP-01500-SCT (Miss. June 18, 2015)

CASE: Capital Murder
SENTENCE: Death

COURT: Copiah County Circuit Court
TRIAL JUDGE: Hon. Lamar Pickard

APPELLANT ATTORNEY: Alison R. Steiner, Andre De Gruy
APPELLEE ATTORNEY: Brad Alan Smith, Jason L. Davis
DISTRICT ATTORNEY: Alexander C. Martin

DISPOSITION: Afirmed. Coleman, Justice, for the Court. Waller, C.J., Randolph, P.J., Lamar, Chandler, and Pierce, JJ., Concur. Randolph, P.J., Specially Concurs with Separate Written Opinion Joined by Waller, C.J., Lamar, Chandler, Pierce, and Coleman, JJ. Dickinson, P.J., Concurs in Part and Dissents in Part with Separate Written Opinion Joined by Kitchens and King, JJ.; Chandler, J., Joins in Part.

ISSUES: (1) Whether the trial court erred in finding Dickerson competent to stand trial; (2) whether the trial court erred in failing to quash the arson indictment and in permitting the arson count to go to the jury; (3) whether reversal is required due to the erroneous admission of inflammatory and prejudicial evidence during the guilt phase; (4) whether the trial court erred by refusing Dickerson's requested sentencing instruction regarding his *Atkins* intellectual disability defense; (5) whether the trial court erred by refusing Dickerson's other proposed sentencing instructions; (6) whether the trial court erred in not entering a life sentence when the jury returned a sentencing verdict that failed to find any aggravating circumstances; (7) whether the aggravating circumstanceswere either legally or factually unsupported; (8) whether Dickerson's death sentence was unconstitutional; (9) whether Dickerson's death sentence was disproportionate; and (10) whether there was cumulative error.

FACTS: David Dickerson and Paula Herrington Hamilton were in a relationship and had one child together, Courtney. The relationship ultimately ended and Paula later remarried. In 2010, Paula sought a protective order against Dickerson, claiming that he was stalking her and their daughter. At 6:30 am, on January 25, 2011, the date of the protective order hearing, Paula's sister Robin was saw a man on the property. Paula investigated and then yelled for help. Paula returned to the house covered in

blood with Dickerson following her demanding keys to her van. Paula's other daughter, Kayla Herrington, saw a man outside the house and later heard two gunshots. Courtney testified that she saw Dickerson holding a gun to her mother's head. Dickerson kicked the door down and pointed his gun at Courtney and threatened to shoot her. Dickerson was holding a gas can and poured gas on Paula and throughout the trailer. Two pastors later driving by saw the trailer on fire. They found Paula alive and on fire trapped under the trailer. Paula died before the police arrived. She sustained gunshots to the head, back, stab wounds to the neck, trunk and first-degree burns. Other witnesses later saw Dickerson in the neighborhood. Dickerson asked one neighbor for some gas. Knowing about the fire, they instead called police and Dickerson was arrested. Dickerson's motorcycle was found near Paula's house. A t-shirt was also found with Paula's blood on it. A .22 caliber pistol was discovered in a water well at an abandoned house not far from the scene. Ballistics showed that the pistol matched the bullet that was removed from Paula. Dr. Criss Lott was appointed to evaluate Dickerson, and later determined he was not mentally retarded, but he was unable to determine whether Dickerson was competent to stand trial. Further evaluation at Whitfield concluded that Dickerson was competent to stand trial and that he had no credible symptoms of mental illness. Dickerson was convicted and sentenced to death. He appealed.

HELD: (1) The trial judge did not err in finding Dickerson competent to stand trial. Three experts examined Dickerson at Whitfield. The experts found that Dickerson suffered from no competency-related deficits, and nothing in their testimony indicates that the experts failed to view a capital murder proceeding as one of significant severity. The experts considered Dickerson's past history of mental illness and found that Dickerson's condition did not affect his competency.

Dickerson also claimed in the alternative that, even if he was competent to stand trial, his history of mental illness precludes imposition of the death penalty. The U.S. Supreme Court has not held that mental illness renders a defendant ineligible for the death penalty.

(2) The indictment for arson was sufficient. The indictment included sufficient facts to inform Dickerson of the charge because it clearly set forth the required elements of the crime, identified the code section violated, and identified the crime as arson.

The evidence of arson was also sufficient. The witnesses testified that Dickerson poured gasoline on Paula and around the trailer and that the trailer burst into flames. The pastors who saw the burning trailer and stopped to help, saw a man standing near the trailer watching it burn. A reasonable juror could infer that Dickerson intentionally started the fire based on his violent attack on Paula, his pouring gasoline on her and throughout the inside of the trailer, and his presence as the trailer burst in flames with Paula inside.

(3) Dickerson argued that the judge erred by admitting the audio of a 911 call, color autopsy photographs, and prior bad acts evidence. The judge admitted the 911 call made by Kayla during the attack as a present sense impression exception to the hearsay rule. This was not an abuse of discretion. The call was mostly unintelligible noise and screaming. Ten seconds into the call, someone screams "David!" Near the end of the call, Kayla says that she saw someone outside, that her mother went to see what he was doing, and that he had a gun. The reference to "David" has a tendency to establish identity, and the caller's statement that her mother went outside to confront a

man with a gun has a tendency to explain the course of events. The call was relevant under MRE 401. It was also more probative than prejudicial.

The autopsy photographs were also relevant. Though he offered to stipulate that Paula was killed by gunshot, Dickerson did not offer to stipulate that she was shot intentionally. The gruesome nature of Paula's injuries, shown in the photographs, had some probative value to show that intent. The color photos showed the burns more clearly.

The trial court did not err in admitting evidence of the stalking charge and protective order. The fact that Dickerson was to appear in court on the day of the murder to face a criminal stalking charge – by which he was alleged to have stalked the murder victim – certainly provided motive for the crime. The only objection at trial concerned testimony that implied the protective order hearing was for other misconduct. However, that was clarified for the jury with no further objection. The claim was waived and was not plain error.

(4) The judge did not err in denying the jury instruction on a defense of mental retardation because the evidence was legally insufficient to support a finding of mental retardation. Dickerson produced no evidence to support the giving of such an instruction. Three experts testified that Dickerson was not mentally retarded. Because no expert opined that Dickerson met the definition of mental retardation to a reasonable degree of certainty, as a matter of law, the jury could not find that Dickerson was mentally retarded and exempt from execution. The jury received sufficient instruction regarding consideration of Dickerson's diminished mental capacity in mitigation.

(5) Dickerson's other penalty phase instruction was properly denied because other instructions adequately informed the jurors of three outcomes that they could reach.

(6) When the jury returned with a verdict of death, the form did not include a finding of any aggravating circumstances. Counsel requested a life sentence since there were no findings indicated on the form for any aggravating circumstances. The judge did not err in instructing the jury to return to the jury room, look at the instructions, and reform their verdict to comply with those instructions. The jury returned a corrected unanimous sentence, recommending the death penalty, and finding the existence of two aggravating factors. The judge only instructed the jury to reform their verdict to comply with the given instructions. He did not instruct the jury to find aggravating factors. The jury's error was a technical defect that could be reformed under § 99-19-11.

(7) The two aggravating factors found by the jury, (whether the killing occurred during a burglary and whether the killing was heinous, atrocious or cruel - HAC), were proper and supported by the evidence. The Court has repeatedly held the underlying felony can also be used as an aggravator. It was not plain error to instruction on HAC. the State presented evidence that Paula suffered multiple gunshot wounds, multiple stab wounds, and significant burns in a drawn-out assault. Evidence was presented that Paula was still alive when the trailer was set on fire. Multiple weapons were used and multiple wounds were inflicted.

(8) Dickerson's death sentence was not unconstitutional because his indictment failed to list the aggravating factors. Further, § 99-19-101(7)'s additional requirement that the jury find that the defendant contemplated that lethal force would be employed is not unconstitutional. Regardless, in

this case, Dickerson was the sole actor in Paula's murder, not an unknowing participant in the underlying felony. The jury found he actually killed, so the contemplation of lethal force requirement is immaterial in this case.

Mississippi's capital punishment scheme is also constitutional. Dickerson failed to provide any data or citations to support his claim that the death penalty is imposed in a discriminatory and irrational manner. He did not cite any authority to support his allegation that the Court fails to conduct proportionality review of death sentences. Mississippi's death penalty statutes are not overbroad and vague. Finally, lethal injection is also constitutional.

(9) Dickerson asserted that the death penalty is constitutionally and statutorily disproportionate in his case due to his chronic mental illness. However, the expert testimony did not support a finding a that Dickerson was mentally retarded. His mental illness was presented as mitigation to the jury. The jury found the aggravators outweighed the mitigation. Dickerson's death sentence is not disproportionate to the crime.

(10) There was no cumulative error.

Randolph, Presiding Justice, Specially Concurring:

Justice Randolph wrote separately to address Justice Dickinson's call to for a judicial overhaul of defining intellectual disability (formerly mental retardation). "The judiciary is ill-equipped to tinker with the established mental-health professionals' diagnostic criteria....Today's majority recognizes that the United States Supreme Court and this Court have adopted and continuously applied the definition of 'mental retardation,' now referred to as 'intellectual disability,' as set forth by the American Association on Mental Retardation (AAMR) and the American Psychiatric Association (APA)..."

Dickinson, Presiding Justice, Concurring in Part and Dissenting in Part:

Justice Dickinson agreed with Dickerson's conviction, but believed his sentence violated *Atkins v. Virginia*. Whether Dickerson's intellectual disability prohibited his execution should have been presented to the jury.

> I would hold that, in death-penalty cases where an accused pleads the defense of intellectual disability—and, prior to the sentencing trial, produces to the trial judge evidence creating reasonable doubt as whether he may be intellectually disabled—the accused may proceed on the defense. In the sentencing phase, the State should bear the burden of proving to the satisfaction of the jury, beyond a reasonable doubt, that the offender is not intellectually disabled.

The jury should be instructed that persons who are intellectually disabled are ineligible for the death penalty, and further, how it should determine if the State met its burden to prove the defendant was not intellectually disabled.

To read the full opinion, click here:
http://courts.ms.gov/Images/Opinions/CO105325.pdf

David Cox v. State, No. 2013-DP-00087-SCT (Miss. June 25, 2015)

CASE: Capital Murder, Kidnapping x2, Sexual Battery x3, Burglary, and Firing into an Occupied Dwelling.
SENTENCE: Death

COURT: Union County Circuit Court
TRIAL JUDGE: Hon. John Andrew Gregory
TRIAL ATTORNEYS: John Kelly Luther, Thomas Roy Trout

APPELLANT ATTORNEY: Alison R. Steiner, Kelsey Levoil Rushing
APPELLEE ATTORNEY: Cameron Leigh Benton
DISTRICT ATTORNEY: Benjamin F. Creekmore

DISPOSITION: Affirmed. Randolph, Presiding Justice, for the Court. Waller, C.J., Lamar, Chandler, Pierce and Coleman, JJ., Concur. Dickinson, P.J., Concurs in Part and in Result with Separate Written Opinion Joined in Part by Kitchens, J. Kitchens, J., Dissents with Separate Written Opinion Joined by King, J.

ISSUES: (1) Whether the trial court erred in failing to change venue; (2) whether the trial court erred in failing to exclude certain testimony and evidence; (3) whether the jury selection process was tainted; (4) whether the trial court erred in instructing the jury on aggravating circumstances; (5) whether the trial court erred in refusing certain jury instructions proposed by Cox; (6) whether the verdict was insufficient under Mississippi Code Sections 99-19-101 and 103 to support imposition of a sentence of death; (7) whether the death sentence is in violation of the Constitution of the United States; (8) whether the death sentence is constitutionally and statutorily disproportionate; and (9) whether there was cumulative error.

FACTS: David and Kim Cox had two children, D.C. and J.C. Cox was the stepfather of Kim's daughter, L.K., born in 1998. Kim and Cox separated in 2009 after L.K. told Kim that Cox had raped her. Cox was arrested on charges of statutory rape, sexual battery, child abuse, possession of precursors, and possession of methamphetamine. During his nine months in prison prior to posting bond, Cox often would become enraged and would tell his cellmates of his hatred for Kim, blaming her for this situation. Cox said that he would kill Kim once released. Kim was afraid of Cox, so she and the children moved in with her sister, Kristie Salmon. Cox was released on bond in April 2010. Cox was working as a commercial truck driver. On his way home on May 14, 2010, Cox purchased a .40 caliber handgun and two extra magazines. Cox then borrowed a van from his sister and went to Salmon's home. Cox shot his way into the home. Kim, L.K., D.C., J.C., and Salmon were at the home. J.C. and Salmon escaped and called for help. Cox took Kim, L.K., and D.C. hostage. Cox communicated with police throughout the night and early morning. Cox had shot Kim twice, once in the arm and once in the abdomen. Cox spoke with hostage negotiators, Kim's father and stepmother, and members of Cox's family. The last confirmation that Kim was still alive was at 12:45 a.m. While Kim lay dying, Cox sexually assaulted L.K. in Kim's presence on three separate occasions. Cox told police he wanted to watch Kim die. Cox also continued to threaten to kill the children if anyone tried to enter the home. A SWAT team finally entered the home at 3:23 a.m., and Cox was taken into custody. L.K. and D.C. were removed from the scene, and Kim was found dead, having

bled out as a result of the abdominal gunshot wound. Cox plead guilty to all charges. A jury was empanelled to determine sentence and returned a death penalty. Cox appealed.

HELD: (1) Cox argued that the trial court erred in denying his motion for change of venue because of media coverage in Union County, which was amplified since Kim's father and step-mother had both had previously worked for law enforcement agencies. However, Cox presented no evidence of extraordinary or intensely prejudicial pretrial publicity. The State rebutted Cox's affidavits and the trial court did not abuse its discretion in failing to move the trial.

(2) L.K. was interviewed shortly after the crime on videotape. The trial court found portions of the video admissible under the tender years exception of MRE 803(25). The State offered a redacted version of the video. Cox objected, arguing for further redactions. The objection was overruled and the video was played. The court then allowed L.K. to take the stand for cross-examination, which Cox declined. The trial court properly allowed the video into evidence, as it supported the aggravators presented to the jury. Even though Cox waived his right to confront this witness, the State is permitted to offer testimony to establish the aggravating circumstances.

Cox objected to the admissibility of evidence related to his prior incarceration. Testimony of Cox's recent incarceration was admitted to show the circumstances surrounding the charged crime to be developed. It was admissible for to show motive, intent, preparation, and plan. He blamed Kim and L.K. for his incarceration. Two of Cox's former cellmates testified that Cox expressed his hatred for Kim, and said that he would kill her. The fact he was incarcerated for sexually assaulting L.K. was excluded.

Cox objected to the admission of six crime-scene photographs. Cox argued that the photos were unnecessary because he admitted killing Kim. Cox offered nothing to support his argument that the photographs were gruesome or inflammatory to the jury. They merely displayed Kim's wounds and were probative to establish the "especially heinous, atrocious, and cruel" treatment of Kim.

The trial court did not err in allowing testimony Cox considered victim-impact testimony. L.K. and Kim's family were fact witnesses to the crime. The Court declined to adopt a different standard for the use of victim-impact testimony.

(3) Cox claimed that the jury selection process was tainted. First he asserted that selected jurors had prior knowledge of the crime or were acquainted with family members. However, of the 98 venire members, only one juror was empaneled who knew the Kirks. Cox argued that two venire members who eventually had expressed an ability to impose the death penalty after previously being unsure were challenged for cause. However, the record reveals both offered inconsistent answers. Other jurors were excused by the agreement of both parties.

There was no violation of *Batson*. Of the 42 potential jurors, 5 were black, and the State struck all 5. Juror 46 was struck based on the ADA's prosecution of the juror's family members. No other white jurors were similarly situated. Juror 97 was struck because she wrote "undecided" regarding the death penalty. Juror 143 was "generally against" the death penalty and had a son convicted of burglary. Juror 148 had been previously employed at a correctional facility. She also had no opinion on the death penalty. Juror 153 indicated on his questionnaire that he could never consider the death penalty.

The trial court did not abuse its discretion in determining that Cox had failed to meet his burden of proving discriminatory intent or purposeful discrimination.

Cox also argued that the trial court breached sequestration by allowing the newly empaneled jurors to go home and pack their bags, giving them one-and-a-half hours away from the court. Cox did not object to this. Cox offered no evidence that a single juror disobeyed the court's instruction.

Cox next belatedly argued that Kim's family was on a "crusade" to influence the jury. He claimed the courtroom was packed with law enforcement, but failed to object at the time. Procedural bar notwithstanding, Cox argues their presence presented a coercive atmosphere of intimidation. However, the victims to these crimes were a housewife and children, not members of law enforcement.

(4) Cox argued the trial court erred in allowing the aggravator of "creating a great danger to many people." This was not an improper stacking of aggravators. Cox's due-process rights were not violated by the aggravators presented to the jury, as four of those aggravators were for crimes committed in conjunction with the murder of Kim.

(5) The trial judge did not err in denying a defense instruction on what would happen if the jury could not agree on punishment. The court also did not err in denying several instructions how to consider mitigating circumstances. Some instructions were considered mercy instructions and some were cumulative. The jurors were properly instructed by the instructions given.

(6) Cox argued that the jury's written findings in this case were insufficient to impose a sentence of death. The jury apparently found all of the aggravators and all of the mitigators submitted to exist beyond a reasonable doubt. "The facts of this crime spree amply support the determination of the jury, which after weighing the aggravators and mitigators, decided that the penalty of death is not too great." There exists no doubt that the jury's verdict was sufficient to impose the death penalty.

(7) Cox's sentence was constitutional. Aggravators do not need to be in the indictment. The Court again declined the argument that the verdict was unconstitutional because the jury was instructed inappropriately under *Enmund v. Florida*. Mississippi's death penalty statute also allows for meaningful appellate review. Finally, lethal injection does not violate the 8th Amendment.

(8) Cox's sentence was not disproportionate to the crime. Cox claimed he suffered from mental illness and brain damage due to years of drug abuse. However, there was conflicting evidence concerning Cox's mental illness. There was also no evidence Cox was on crystal meth at the time of the crime. The State's expert determined Cox was malingering. It was for a jury to sort out the contested facts and conflicting evidence. The jury did not believe this was sufficient mitigation.

(9) There was no cumulative error.

Dickinson, Presiding Justice, Concurring in Part and in Result:

Justice Dickinson wrote separately to urge a change to the capital murder statute, amending the "contemplated that lethal force would be employed," language of the *Enmund* factors to conform with

the requirements of *Tison v. Arizona*, 481 U.S. 137 (1987). Although not a factor in Cox's case, he could not concur that the current language of §99-19-105(3)(c) is constitutional.

Kitchens, Justice, Dissenting:

Justice Kitchens dissented, arguing the trial court committed reversible error by failing to grant a change of venue, and that the testimony of L.K. was cumulative of a forensic interview video published to the jury, and therefore improper. "In a notorious capital case such as this, due process requires that the trial court take extra precaution to protect the defendant's right to a fair trial. I find no imaginable reason for this motion for change of venue to have been denied." He also believed the State had no other reason to call L.K. to the stand after her interview video was played but to unduly influence the jury.

To read the full opinion, click here:
http://courts.ms.gov/Images/Opinions/CO104733.pdf

Caleb Corrothers v. State, No. 2015-IA-00975-SCT (Miss. September 17, 2015)

CASE: PCR – Interlocutory Appeal
SENTENCE: Death

COURT: Lafayette County Circuit Court
TRIAL JUDGE: Hon. Andrew K. Howorth

APPELLANT ATTORNEY: Louwlynn Vanzetta Williams
APPELLEE ATTORNEY: Jason L. Davis

DISPOSITION: Trial Court's Order to allow the State Reciprocal Discovery Vacated and Rendered. Kitchens, J. for the Court. Dickinson, P.J., Pierce, King and Lamar, JJ., Agree. Chandler, J., Objects with Separate Written Statement, Joined by Waller, C.J., and Randolph, P.J. Coleman, J., Disagrees.

ISSUE: Whether the trial court erred in ordering reciprocal discovery for the State under MRAP 22.

FACTS: On May 19, 2011, Caleb Corrothers was convicted of two counts of capital murder and was sentenced to death. (He also had a separate aggravated assault conviction). His conviction was affirmed on appeal. ***Corrothers v. State***, 148 So. 3d 278 (Miss. 2014). The Mississippi Office of Post-Conviction Counsel was appointed to assist Corrothers in preparing and filing his petition for post-conviction relief, which is due on or before October 5, 2015. MRAP Rule 22 allows the petitioner's lawyers access to "discovery and compulsory process" for the purpose of gaining access in support of the petition for post-conviction relief. MRAP 22 (c)(4)(ii). In March of 2015, counsel sought records from the youth court, DHS, and copies of videos that ran on local news stations. The State then filed a request for reciprocal discovery for copies of any discovery Corrothers might receive. Corrothers objected, but the circuit court granted the State's request. Corrothers then filed an interlocutory appeal arguing that the State is not entitled to reciprocal discovery under Rule 22.

HELD: Rule 22 clearly provides that discovery and compulsory process may be allowed a petitioner, but it is "equally is apparent that the rule lacks a similar provision allowing the State to compel discovery or receive reciprocal discovery from the petitioner." Corrothers is simply gathering evidence to assist in the filing of a PCR. The PCR case does not exist yet. The State is not a party to Corrothers's present discovery endeavors. If Corrothers is allowed to file a PCR by the Court, the State will then be entitled to discovery.

Chandler, Justice, Objecting to the Order with Separate Written Statement:

Justice Chandler objected, arguing since there is no indication the youth court disclosed any information to Corrothers, the case was not ripe for review. "As yet, no records have been released, and it is entirely possible that none will be released. I would find that this Court's review of the circuit court's discovery order is premature, and I disagree with this Court's use of judicial resources to answer a question that, for all practical purposes, is unripe."

To read the full opinion, click here:
http://courts.ms.gov/Images/Opinions/200916.pdf

In a separate order, after objection by the State, the MSSCT disqualified two staff attorneys in the Office of Capital Post-Conviction Counsel from representing Corrothers, finding they were not qualified under MRAP 22.

To read the disqualification order, click here:
http://courts.ms.gov/Images/Orders/700_191980.pdf

Erik Wayne Hollie v. State, No. 2014-DP-00006-SCT (Miss. September 24, 2015)

CASE: Capital Murder and Armed Robbery
SENTENCE: Death plus 50 years

COURT: Copiah County Circuit Court
TRIAL JUDGE: Hon. Lamar Pickard
TRIAL COURT ATTORNEYS: M. A. Bass, Jr., Renee Berry

APPELLANT ATTORNEY: Alison R. Steiner, Andre de Gruy
APPELLEE ATTORNEY: Jason L. Davis
DISTRICT ATTORNEY: Alexander C. Martin

DISPOSITION: Reversed, Vacated and Remanded. Waller, Chief Justice, for the Court. Dickinson, P.J., Kitchens, Chandler and King, JJ., Concur. Dickinson, P.J., Specially Concurs with Separate Written Opinion Joined by Waller, C.J., and King, J.; Kitchens, J., Joins in Part. Kitchens, J., Specially Concurs with Separate Written Opinion Joined by Waller, C.J., Dickinson, P.J., and King, J. Lamar, J., Concurs in Part and Dissents in Part with Separate Written Opinion Joined by Pierce and Coleman, JJ.; Dickinson, P.J., Joins in Part. Randolph, P.J., Dissents with Separate Written Opinion.

ISSUE: Whether the case should be reversed because the trial judge did not hold a formal

competency hearing.

FACTS: On September 5, 2009, Erik Wayne Hollie got into an argument about religion at a BP gas station with an employee named Lalit Patel. The next day, Hollie went back and got into another altercation with Patel. Hollie pulled a knife on Patel, grabbed a pack of cigarettes and drove off without paying for $30 worth of gas. Two days later, Hollie went into the Wesson Pawn and Gun Shop and killed the store owner, Denmon Ward. Hollie turned himself in the next day. Hollie confessed to killing Ward. He said he did not know why he did it, but that he was led to the pawn shop by "the Lord," and that Ward died because he did not follow "the Lord." Hollie also confessed to the armed robbery of Patel. Hollie made multiple references to having mental health issues and said he was "fed up with life" and that the police could kill him. He said the "Lord" had led him "to turn myself in or die." Hollie asked the officers to "take me out back and do me right and shoot me in the f***ing head. That's all I want." After his indictment, Hollie said he didn't care about having an attorney, but eventually requested one. His attorney requested a mental examination which the court granted. Dr. Criss Lott conducted the examination and prepared a report. However, before a hearing was held, Hollie pled guilty. Based on Hollie's request, no mitigation evidence was presented. A jury subsequently sentenced him to death in March of 2010. Hollie did not file a post-trial motion or any appeal or any motions for post-conviction relief. The Office of State Public Defender attempted to get involved in 2012 in order to file an out of time appeal, but the court ultimately found it had no jurisdiction. The MSSCT began a mandatory statutory review of the case after the State filed a motion to set Hollie's execution date.

HELD: Once a trial court orders a mental evaluation, a competency hearing is mandatory. This is reversal error. The State's argument that Hollie is not entitled to a competency determination or new trial because Hollie waived his right to a competency hearing by pleading guilty is without merit. The case is remanded to the trial court to determine Hollie's competence to stand trial.

Only only aggravator found by the jury during Hollie's sentencing was the armed robbery conviction from the BP station. Hollie pled guilty to this armed robbery at the same time he pled guilty to the capital murder. The Court will not usually inquire into the validity of a prior conviction used as an aggravating circumstance if it appears valid on its face. However, in this case, the order for the competency evaluation was for both Hollie's capital-murder charge and his armed-robbery charge. The trial court accepted Hollie's guilty plea to armed robbery without conducting a competency hearing. Therefore, both convictions were vacated and remanded.

Dickinson, Presiding Justice, Specially Concurring:

Justice Dickinson noted that although the armed-robbery case was not before the Court on a direct appeal, it was appropriate it consider it. As Justice Kitchens pointed out, the State did not prove that Hollie was previously convicted of armed robbery because no judgment of conviction was entered after Hollie pled guilty to that charge. Further, even if Hollie was convicted of armed robbery, he was not *previously* convicted, because his pleas for armed robbery and capital murder were entered in the same hearing. Accordingly, double jeopardy precludes the State from seeking a second death sentence if Hollie is found competent on remand.

Kitchens, Justice, Specially Concurring:

Justice Kitchens agreed with the reversals, but wrote to express his belief that the State submitted insufficient evidence of the statutory aggravator of a prior violent felony. No judgment of conviction was entered before the capital sentencing trial. Therefore, since jeopardy attached to the sentencing portion of Hollie's trial, the State is prohibited from seeking the death penalty on remand.

Randolph, Presiding Justice, Dissenting:

Justice Randolph dissented, believing that any error in failing to hold a formal competency hearing was harmless. There was clear evidence in the record showing Dr. Lott determined Hollie was competent. Since Hollie did not object to the competency finding at his plea, he waived a Rule 9.06 hearing. "Hollie's confession, guilty plea, statement to the jury, and Dr. Lott's report all provide overwhelming evidence of guilt, and Hollie has suffered no prejudice."

Lamar, Justice, Concurring in Part and Dissenting in Part:

Justice Lamar concurred that Hollie's death sentence must be set aside, but disagreed that his convictions should be reversed. Hollie's case was not before the Court on direct appeal, but upon a mandatory sentence review as required by §99-19-105. She believed the Court should not review anything but the sentence. Neither the capital murder conviction nor the armed robbery conviction was properly before the Court.

> I would recognize this Court's limited mandate to review Hollie's death sentence. And even though it may not be "efficient," I would stop our analysis there, and I would reverse Hollie's death sentence and remand this case to the trial court for further proceedings.

To read the full opinion, click here:
http://courts.ms.gov/Images/Opinions/CO105067.pdf

NON-DEATH PENALTY CASES:

April 16, 2015

Jamil Chancellor v. State, No. 2013-KA-00481-SCT (Miss. April 16, 2015)

CASE: Armed Robbery and Armed Carjacking
SENTENCE: 25 years with 10 years suspended on each count concurrently, an additional 5 years enhancement for use of a firearm under §97-37-37

COURT: Hinds County Circuit Court
TRIAL JUDGE: Hon. Jeff Weill, Sr.

TRIAL COURT ATTORNEYS: Brad M. Hutto, Gale L. Walker, Frank C. Jones, III
APPELLANT ATTORNEY: Justin Taylor Cook
APPELLEE ATTORNEY: Melanie Dotson Thomas
DISTRICT ATTORNEY:

DISPOSITION: Affirmed. Randolph, Presiding Justice, for the Court. Waller, C.J., Lamar, Kitchens, Chandler, Pierce, King and Coleman, JJ., Concur. Dickinson, P.J., Specially Concurs with Separate Written Opinion, Joined by Waller, C.J., Randolph, P.J., Lamar, Kitchens, Chandler, Pierce and Coleman, JJ.

ISSUE: Whether the trial court erred in preventing the defense from putting on evidence of both the defendant's lack of education and his co-indictee's criminal history, in support of his theory of defense.

FACTS: Jamil Chancellor robbed Marcell Cox at gunpoint, as he was leaving Elegante Coiffures, a barbershop and salon. One of Cox's coworkers exchanged gunfire with Chancellor, shooting him in the face. Chancellor fled the scene, leaving behind Cox's car, and ran across the street into the woods. He was eventually arrested and gave two statements to police. Chancellor stated that Latanya Buckner, a/k/a World, was upset with her boss, Cox, because he refused to do anything after her car was stolen from the barber shop's parking lot. Buckner asked Chancellor to rob her boss on a day when he would have a large amount of cash on him. Chancellor stated that he was afraid if Buckner, who had a known affiliation with a gang, found out he had told the police about their arrangement, she would have him killed. However, Chancellor never said that he was forced or coerced by Buckner into committing the armed robbery. At trial, Chancellor claimed he committed the robbery under duress based on his fear of Buckner. The trial judge agreed with the State that evidence of Chancellor's lack of education was irrelevant, but that Chancellor could offer that testimony if he took the stand. The court also sustained the State's objections to the defense cross of a detective regarding Buckner's past arrest record.

HELD: Chancellor's theory of defense was that he had been forced to commit the robbery by Buckner. Chancellor argued that his educational level was relevant to his defense of duress. However, Chancellor was able to present testimony regarding his lack of education. Even though he was denied the ability to question a detective regarding Buckner's past arrest record, he did get in evidence concerning Buckner's association with gang members, and numerous instances of Buckner's prior bad acts.

The trial judge did not err in refusing to allow Chancellor to introduce evidence of Buckner's alleged arrests, for the proffered arrests had no connection to Chancellor. The trial court properly found that such arrests would only mislead and confuse the jury. None of Buckner's arrests was related to coercing someone else to do her dirty work.

Dickinson, Presiding Justice, Specially Concurring:

Justice Dickinson agreed the case should be affirmed, but wrote to explain why the trial judge's reliance on Rule 609 was erroneous when he sustained the State's objection to Chancellor's attempt to cross-examine a detective about Buckner's arrest history. Evidence establishing Buckner's arrest record was relevant to Chancellor's duress defense. The trial judge erred in excluding evidence of Buckner's arrests under Rule 609, based on the rule's requirements of convictions, rather than arrests, and its ten-year limit. Rule 609 applies only when a party uses a prior conviction to impeach a

witness's character for truthfulness. The detective was not being impeached on his prior convictions, so Rule 609 did not apply.

To read the full opinion, click here:
http://courts.ms.gov/Images/Opinions/CO101085.pdf

Larry Collier v. State, No. 2014-KA-00087-SCT (Miss. April 16, 2015)

CASE: Sale of Cocaine x3
SENTENCE: 40 years on the first two counts and one day on the third count, with sentences to run consecutively

COURT: Rankin County Circuit Court
TRIAL JUDGE: Hon. William E. Chapman, III

TRIAL COURT ATTORNEYS: A. Randall Harris, Dewey K. Arthur, Joey W. Mayes
APPELLANT ATTORNEY: Grady Morgan Holder, John M. Colette, Robert L. Sirianni, Jr.
APPELLEE ATTORNEY: Scott Stuart
DISTRICT ATTORNEY: Michael Guest

DISPOSITION: Affirmed. Dickinson, Presiding Justice, for the Court. Waller, C.J., Randolph, P.J., Lamar, Kitchens, Chandler, Pierce, King and Coleman, JJ., Concur.

ISSUES: (1) Whether the trial court erred in prohibiting Collier from cross-examining Melvin about her undisclosed criminal convictions and prohibiting admission of her prior guilty plea petition, and (2) whether the evidence was sufficient to support the verdicts.

FACTS: Larry Collier was convicted of three counts of selling cocaine to a confidential informant, Shirley Melvin. Melvin decided to go undercover for the Rankin County Sheriff's Department after she was arrested for selling cocaine. While working off her charges, Melvin set up several drug buys with Collier under Investigator Barry Vaughn's supervision. Vaughn searched Melvin before each transaction, but admitted that Melvin could have hidden cocaine in places on her body or in her car that were never searched. At trial, Melvin was asked by the State about her criminal record. Melvin said she had five forgery convictions dating back to 2001, which she characterized as being for "bad checks." When asked if she had another felony conviction, Melvin said she had a felony conviction sometime around 2000 for selling crack cocaine. She also admitted to the 2010 arrest which caused her to work as a CI. The video of the three transacations with Collier were played for the jury. During cross-examination, the defense attempted to impeach Melvin for her failure to disclose three other convictions from the 1970's, claiming she had opened the door by failing to disclose them after being asked by the State about her criminal history. The trial court denied the request, stating Collier did not provide notice under MRE 609.

HELD: (1) Collier argued that the trial court's refusal to let him cross-examine Melvin about her other three convictions violated the Confrontation Clause, and that the trial court should have allowed him to introduce Melvin's guilty-plea petitions into evidence. Rule 609—by its very terms—has no application when a witness lies on the witness stand. Impeachment of specific testimony simply is

outside the purview of Rule 609, including its advanced-written-notice requirements. The trial judge erred by refusing to allow Collier's counsel to cross-examine Melvin on all of her convictions.

"Had the State asked Melvin to disclose all of her criminal convictions during the last ten years, this issue would not be before us. But the State chose to ask Melvin about all her convictions, even those barred by Rule 609."

However, the SCT found the error harmless. The jury was aware Melvin was a seasoned felon. Collier was also allowed to impeach her characterizations of the forgeries as "bad checks." Because Melvin's credibility had already been tarnished, and because of the substantial video evidence of the transactions, the disclosure of three more convictions would not have had made any difference.

When Collier sought to introduce Melvin's guilty-plea petition, Melvin had not been cross-examined about her inconsistent criminal history. Until Melvin testified one way or the other, her guilty-plea petition could not be used for impeachment purposes. Even if it could be used for such purposes, the statement could not be introduced as substantive evidence.

(2) Collier argues that the jury's verdict was based on speculation and that the evidence was insufficient to prove that Collier sold cocaine to Melvin. Collier notes that Melvin's testimony made the State's case and that the video of the transactions alone was insufficient. Collier further argued that Melvin was so desperate to stay out of jail that she framed Collier. "Melvin's testimony along with the recordings—as unclear as they were—*could* have been sufficient for a reasonable juror to find Collier guilty of selling cocaine." [emphasis supplied].

To read the full opinion, click here:
http://courts.ms.gov/Images/Opinions/CO102539.pdf

April 23, 2015

Joseph Cook v. State, No. 2013-KA-01240-SCT (Miss. April 23, 2015)

CASE: Sexual Battery x2 and Directing or Causing a felony to be committed by a person under 17
SENTENCE: Life as an habitual offender on the two sexual batteries, and 20 years on Count III, all concurrent

COURT: Rankin County Circuit Court
TRIAL JUDGE: Hon. John Huey Emfinger
TRIAL COURT ATTORNEYS: John R. Mcneal, Jr., Vicky F. Williams, Jacqueline Landes Purnell

APPELLANT ATTORNEY: John R. McNeal, Jr.
APPELLEE ATTORNEY: Melanie Dotson Thomas
DISTRICT ATTORNEY: Michael Guest

DISPOSITION: Affirmed. Kitchens, Justice, for the Court. Waller, C.J., Dickinson and Randolph, P.JJ., Lamar, Chandler, Pierce, King and Coleman, JJ., Concur.

ISSUES: (1) Whether the trial court erred in allowing the statements made by the child victims to a Sexual Assault Nurse Examiner (SANE) into evidence, (2) whether the trial court erred in allowing the statements the children made to their great-grandmother and to a forensic interviewer, and (3) whether the trial court erred by sentencing him as an habitual offender.

FACTS: Joe Cook was convicted of two counts of sexual battery on his girlfriend's 10-year-old daughter, S.J., and one count of causing a minor to commit a felony, by directing his girlfriend's son, nine-year-old H.L., to also have sex with S.J. Cook lived with S.J., H.L., and their mother. On March 3, 2012, Cook dropped the children's mother off at work and returned home with the children. He then showed them sex videos and sex toys, and then assaulted S.J. and directed H.L. to have sex with his sister. S.J. testified that Cook threatened to poison them if they told, and then made them take a bath and put on different clothes before they went to pick up their mother. S.J. told her mother what happened, and she confronted Cook. Cook claimed he caught the children having sex with each other and took care of it. The mother testified she stayed with Cook for financial reasons, as she was 7 months pregnant. The children's great-grandmother testified S.J. eventually told her what happened. After a discussion with the children's mother, a police report was filed. S.J. disclosed to a forensics interviewer that Cook at assaulted her, but H.L. did not. A SANE nurse then examined S.J. on May 2, 2012. S.J. told the nurse Cook had sex with her, but the examination show no physical injuries. The nurse testified as an expert that she would not have expected to find injuries fifty days after the assault was alleged to have occurred. A defense expert testified he would expect to find "significant trauma" to S.J.'s hymen if penetration occurred. Cook also called his sister and her husband to testify Cook and the children were at their house on March 3rd until around 8:30 pm. The State also called Dr. Scott Benton, the medical director of the Children's Justice Center, who also agreed with the SANE nurse that sexual abuse would not necessarily be physically evident in the victim after that amount of time.

HELD: (1) Cook argued that the video-recorded statements of S.J. and H.L., constituted inadmissible hearsay. The children's medical histories were admissible under MRE 803(4), which allows hearsay statements made for the purposes of obtaining a medical diagnosis or medical treatment. At a hearing on the motion, counsel did not object, so the issue was waived.

(2) Cook also claimed statements made to the interviewer and great-grandmother were not admissible under the tender years exception in MRE 803(25). The trial court conducted a tender-years hearings with regard to the testimony of S.J., H.L., the great-grandmother, and the interviewer. Nothing in the record suggests that the statements made to the great-grandmother by S.J. and H.L. were based on a motive of either child to lie. The court did not find the forensics interview to be suggestive.

(3) Cook had previously been convicted of two counts of grand larceny on the same day. He was sentenced to 4 years on each count to run concurrently. However, the State showed that Cook was charged in separate indictments with two separate cause numbers for stealing two different four-wheelers from two different victims at different locations at two different times on the same day. He was properly sentenced as an habitual offender.

To read the full opinion, click here:
http://courts.ms.gov/Images/Opinions/CO103194.pdf

Jason Isham v. State, No. 2014-KA-00038-SCT (Miss. April 23, 2015)

CASE: Felonious Child Abuse
SENTENCE: 30 years, followed by 15 years of PRS

COURT: DeSoto County Circuit Court
TRIAL JUDGE: Hon. Gerald W. Chatham, Sr.
TRIAL COURT ATTORNEYS: William Robert Bruce, Stacey Alan Spriggs, Steven Jubera

APPELLANT ATTORNEY: Mollie Marie McMillin
APPELLEE ATTORNEY: Barbara Wakeland Byrd

DISPOSITION: Reversed and Remanded. Kitchens, Justice, for the Court. Dickinson, P.j., Lamar, King and Coleman, JJ., Concur. Randolph, P.J., Concurs in Result Only with Separate Written Opinion Joined by Chandler and Pierce, JJ. Waller, C.J., Not Participating.

ISSUES: Whether the trial judge erred in denying funds for a defense expert.

FACTS: Jason Isham was convicted of one count of felonious child abuse of his wife's two-year-old son Tommy. Tommy was hospitalized in May of 2012, for a severe, traumatic brain injury, which caused severe swelling of the child's brain, stroke, and permanent weakness on his right side. Because Isham was alone with Tommy when this occurred, he was charged. At trial, three expert medical witnesses for the State testified that Tommy's injuries resulted from severe blunt trauma. Isham, who was represented by a public defender and a pro bono attorney, requested funds with which to hire his own expert to testify about possible alternative causes for Tommy's injuries. Isham designated two experts, Dr. Terry Moore and Dr. Joseph Wippold. Dr. Moore, a professor of internal medicine and pediatrics and director of pediatric rheumatology, diagnosed Tommy with Systemic Lupus Erythematosus and CNS Vasculitis. Dr. Wippold, a neuroradiologist, opined that Tommy was injured through accidental trauma. The trial court agreed that Isham probably should have an expert, but did not believe he had the authority fund it. The court also believed the motion, 11 days before trial, was untimely. The State claimed that Isham was not indigent because he had been released on a $50,000 bond. The request for funds was denied. Isham was subsequently convicted and appealed.

HELD: In light of this Court's recent holding in *Brown v. State*, 152 So. 3d 1146 (Miss. 2014), Isham's conviction was reversed and remanded for a new trial in which the trial court must order public funds for such defense experts as are necessary for the accused to prepare and present an adequate defense.

In this case, both Isham's and the government's interest in a fair and accurate criminal trial far outweigh the county government's pecuniary interest in the public funds it must pay to compensate Isham's expert witnesses. The State's experts testified that blunt-force trauma was the only way that Tommy could have received his injuries. The denial of funding prevented Isham from developing his defense. Although Isham filed the motion eleven days before trial was set to begin, the interest in providing a fair trial to the accused far outweighs the interest of the trial court in keeping a timely docket.

The trial court's order assigning Isham a public defender clearly indicates that he was financially unable to pay for an attorney and was indigent. Although Isham was released on bond, this fact is not dispositive of Isham's indigent status.

Randolph, Presiding Justice, Concurring in Result Only:

Justice Randolph agreed the case needed to be reversed, but not because of any trial court error, but because counsel was untimely with his expert funding request. He believed Isham was denied effective assistance of counsel. This was plain error. "Isham was denied a fair trial due to the failure of defense counsel to consult expert witnesses and to schedule their appearances, and if funds were necessary for further consultation and their appearances, to timely seek same."

To read the full opinion, click here:
http://courts.ms.gov/Images/Opinions/CO103494.pdf

April 30, 2015

Tyrone Boyd v. State, No. 2014-KA-00404-SCT (Miss. April 30, 2015)

CASE: Exploitation of a Child
SENTENCE: 12 years, with 5 suspended, and 5 years probation

COURT: Lauderdale County Circuit Court
TRIAL JUDGE: Hon. Lester F. Williamson, Jr.
TRIAL COURT ATTORNEYS: Phillip S. "Flip" Weinberg, Kathryn R. McNair

APPELLANT ATTORNEY: Erin Elizabeth Pridgen
APPELLEE ATTORNEY: Scott Stuart
DISTRICT ATTORNEY: Bilbo Mitchell

DISPOSITION: Affirmed. Pierce, Justice, for the Court. Waller, C.J., Randolph, P.J., Lamar, Kitchens, Chandler, King and Coleman, JJ., Concur. Dickinson, P.J., Concurs in Result Only Without Separate Written Opinion.

ISSUE: Whether the trial court abused its discretion by admitting Facebook and text messages into evidence that the State failed to properly authenticate.

FACTS: On June 13, 2012, 12 year old RDS received a Facebook friend request from someone named "Tyrone Boyd." RDS did not know Boyd, a 32 year old man, but the two shared a mutual friend, so she accepted his friend request. Boyd and RDS began sending Facebook messages to each other. Boyd said that he was 17. RDS informed her stepfather about her conversations with Boyd. The stepfather said that the name "Tyrone Boyd" sounded familiar and he told RDS that he may have attended high school with Boyd. RDS subsequently gave her cell phone to her stepfather, and he began to send text messages to Boyd on RDS's cell phone, posing as RDS, using the Facebook phone application. At one point, Boyd asked if RDS was a virgin. The stepfather, posing as RDS, told Boyd she was 14. The stepfather gave Boyd her phone number to communicate by text. After messages

about losing her virginity, the stepfather set up a meeting with Boyd at a local gas station. The stepfather drove to the store and saw Boyd, who he recognized as an old classmate. Police were notified and investigator Gypsi Ward continued to message Boyd posing as RDS. Another meeting was set up and Boyd was arrested and his cell phone confiscated. The phone had no content, but did have some contacts, including RDS's number. Boyd denied ownership of the phone and the Facebook account. At trial, without objection, the State submitted printouts of the Facebook messages between the Tyrone Boyd account and RDS's account, as well as text-message printouts, taken from RDS's phone, of messages sent between RDS's number and Boyd's number.

HELD: Boyd did not object to the evidence at trial, so the claim is waived on appeal. Regardless, the claim is also without merit. Last year, the SCT set forth the requirements for authenticating social media messages. *Smith v. State*, 136 So. 3d 424 (Miss. 2014). As to the Facebook messages, Boyd was arrested at the time and meeting place arranged in text messages originating from a number containing the six digits disclosed in a message from Boyd to RDS. He had a phone containing RDS's phone number in his possession, and the messages also happened to be from Tyrone Boyd.

As to the text messages, the State submitted a printout made from RDS's phone of text messages between RDS and the number attributed to Boyd. Boyd arrived at or just behind the gas station twice immediately after messages were sent between his phone and RDS's phone agreeing to meet there, and Boyd's presence was confirmed by three eyewitnesses. Police confiscated a phone when Boyd was arrested that had the same number with which RDS had communicated. Lastly, the confiscated phone's contacts list contained RDS's phone number, despite the fact that Boyd claimed not to know her.

Smith does not stand for the proposition that the State must authenticate electronic communications by subpoenaing the telephone company and obtaining global positioning information for each message sent to prove that a person authored the messages in question. *Smith* provides that other "peculiar circumstances" may establish authenticity. The facts in this case provided sufficient authentication.

To read the full opinion, click here:
http://courts.ms.gov/Images/Opinions/CO103458.pdf

Michael Taylor v. State, No. 2009-KA-00560-SCT (Miss. January 8, 2015)

CASE: Aggravated Assault
SENTENCE: Five (5) Years, with Three (3) Years Suspended, and Five (5) Years Supervised Probation

COURT: Hinds County Circuit Court
TRIAL JUDGE: Hon. Tomie T. Green

APPELLANT ATTORNEY: Mollie Marie Mcmillin, George T. Holmes, Alice Theresa Stamps, Virginia Lynn Watkins
APPELLEE ATTORNEY: Billy L. Gore
DISTRICT ATTORNEY: Robert Shuler Smith

DISPOSITION: Affirmed. Coleman, Justice, for the Court. Randolph, P.J., Lamar, Chandler, and Pierce, Concur. Waller, C.J., Dissents with Separate Written Opinion Joined by Dickinson, P.J.; Kitchens, J., Joins in Part. Dickinson, P.J., Dissents with Separate Written Opinion Joined by Kitchens and King, JJ.; Waller, C.J., Joins in Part.

ISSUE: *Lindsey* brief. Whether the defendant was deprived of his right to a speedy trial.

FACTS: On January 6, 2007, Michelle Finney arrived at a child's birthday party and parked her car on the street, blocking Michael Taylor's car in a driveway. An argument and fistfight ensued. After bystanders broke up the fight, Taylor shot Finney in the arm and fled. He was later arrested for possessing narcotics and for being a felon in possession of a firearm on January 8, 2007. He was indicted for aggravated assault in August of 2007. He demanded a speedy trial on August 21, 2008, and moved to dismiss on speedy-trial grounds on November 6, 2008. His trial began on December 1, 2008. No party ever requested a continuance. He was convicted and requested an appeal. On appeal, Taylor's appellate counsel filed a *Lindsey* brief stating that she had identified no appealable issues. The SCT requested additional briefing.

HELD: The majority concluded there were no issues that warranted reversal. However, because the dissent disagreed and filed an opinion on the speedy-trial issue, the SCT agreed to address that claim. Although the delay was presumptively prejudicial, Taylor suffered no actual prejudice. The only reason for the delay cited by the State and evident from the record was a congested docket. Taylor did demand a speedy trial 15 months after his arrest and one year after he was indicted, and the trial was held 3½ months after he made the demand. Taylor failed to support his claim that the delay prevented him from finding an alibi witness.

"Balancing all the *Barker* factors – and considering the overwhelming precedent of what constitutes prejudice and the undisputed absence of actual prejudice here – leads to a holding that Taylor's right to a speedy a trial was not violated."

Waller, Chief Justice, Dissenting:

Chief Justice Waller believed that Taylor's constitutional right to a speedy trial was violated under the specific facts of this case.

Dickinson, Presiding Justice, Dissenting:

Justice Dickinson believed that not only was Taylor's right to a speedy trial violated, but wrote about his continued concern for the state of the right to a speedy trial in Mississippi. He believed all four *Barker* factors weighed in Taylor's favor and that his right to a speedy trial was clearly violated.

> With little success, I have tried to kindle some modicum of concern for that right on this Court. Although discouraged, I refuse to lay down my pen, recognizing full well that this opinion will join my previous ones in the boneyard of dissents that fell on deaf ears. I too loathe the reality that in some cases—because of errors by law enforcement, the prosecutor, the defense counsel, or the trial court—a person who

> committed a crime may go free. But I loathe even more the thought that we should move systemically toward eliminating that risk by ignoring important constitutional rights in order to obtain and uphold convictions. That view, history teaches, inevitably leads to tyranny.

To read the full opinion, click here:
http://courts.ms.gov/Images/Opinions/CO103669.pdf

May 7, 2015

Jordan Davis v. State, No. 2012-CT-00863-SCT (Miss. May 7, 2015)

CASE: Possession of Stolen Property
SENTENCE: 8 years, with 4 to serve and the remaining 4 on PRS

COURT: Claiborne County Circuit Court
TRIAL JUDGE: Hon. Lamar Packard
TRIAL ATTORNEYS: Lisa Ross, Lamar Arlington, Terry Wallace

APPELLANT ATTORNEY: Hunter Nolan Aikens
APPELLEE ATTORNEY: LaDonna C. Holland
DISTRICT ATTORNEY: Alexander C. Martin

DISPOSITION: COA Reversed in Part. Conviction Reversed and Rendered. Chandler, Justice, for the Court. Waller, C.J., Dickinson and Randolph, P.JJ., Lamar, Kitchens, Pierce and King, JJ., Concur. Coleman, J., Concurs in Part and in Result Without Separate Written Opinion.

ISSUE: Whether the COA erred in refusing to reverse and render a defective indictment under §97-17-70 for both stealing and receiving the same property.

FACTS: Jordan Davis was indicted for auto theft, grand larceny, receiving stolen property, and conspiracy. The vehicle behind the auto theft charge was the same stolen property he was charged with receiving. The conspiracy charge was dismissed prior to trial. Davis was acquitted of the charges of auto theft and grand larceny but was found guilty of receiving stolen property. The COA reversed the case last year, holding that his indictment was defective since he could not be charged under §97-17-70 for both stealing and receiving the same property. *Davis v. State*, No. 2012-KA-00863-COA (Miss.Ct.App. February 25, 2014). However, the COA refused to render on the receiving stolen property charge as appellate counsel failed to cite authority for the grounds that reversal was not proper. Davis was granted certiorari.

HELD: The COA properly accepted the State's confession of error, because the charges brought against Davis clearly violated the plain language of §97-17-70(3)(a). The COA also correctly rejected the State's proposed harmless-error analysis, because the statute plainly states that such charges "shall not be brought." However, the COA erred by remanding for further proceedings rather than rendering judgment. The plain language of §97-17-70(3)(a) does not permit a retrial of Davis for receiving stolen property.

> Under Section 97-17-70(3)(a), when a defendant can be charged with either stealing or receiving the same property, the State must opt to charge the defendant with either stealing or receiving the property. Davis has been tried once in Claiborne County for stealing and receiving the same property. He has been tried and acquitted of stealing the property. Thus, he cannot be retried for receiving the property under the plain terms of Section 97-17-70(3)(a).

To read the full opinion, click here:
http://courts.ms.gov/Images/Opinions/CO103870.pdf

May 21, 2015

Charles David Burleson v. State*, *II, No. 2013-KA-00772-SCT (Miss. May 21, 2015)

CASE: Capital Murder
SENTENCE: Life w/o Parole

COURT: Prentiss County Circuit Court
TRIAL JUDGE: Hon. James Lamar Roberts, Jr.
TRIAL ATTORNEYS: John C. Helmert, Jr., Vicki R. Slater, Richard D. Bowen, Josh Wise

APPELLANT ATTORNEY: Erin Elizabeth Pridgen, George T. Holmes, John Carl Helmert, Jr.
APPELLEE ATTORNEY: Melanie Dotson Thomas
DISTRICT ATTORNEY: J. Trent Kelly

DISPOSITION: Reversed and Remanded. Waller, Chief Justice, for the Court. Dickinson, P.J., Chandler and Coleman, JJ. Concur . Kitchens J., concurs in part and in result with separate written opinion joined by King, J, King J., concurs in part and in result without separate written opinion. Pierce, J., dissents with separate written opinion joined by Randolph, P.J., and Lamar, J.

ISSUES: (1) Whether the trial court violated Burleson's right to due process by amending the indictment to include habitual offender status under §99-19-83; (2) whether the trial court erred in admitting a gun introduced into evidence by the State; (3) whether the trial judge erred in failing to give circumstantial evidence jury instruction; (4) whether the evidence was sufficient.

FACTS: On May 15, 2010, Donnie Holley returned to his home in Thrasher, MS after a fishing trip. As he was checking his mail, he noticed a white car driving off his property. When he entered his house, he found his son Steven lying on the floor in the living room with a pool of blood under his head. The house had been ransacked. Steven died 5 days later. Police began investigating Steven's associates. Investigators received a message from Tammy Cook about the case. Cook stated that Jeremy Huguley and his girlfriend Kayla Cartwright, along with another man, later identified as Charles David Burleson, came to her house in a white Oldsmobile. Cook watched Huguley take a metal bar out of the car and throw it into the woods next to her house. Huguley also retrieved a garbage bag from the car and placed it under Cook's porch. Cook also told investigators that Huguley previously had left a gun at her house, hidden in her son's room. Huguley had come back to her house

while she was gone and retrieved the gun and took $200 in cash from her son's room. Police retrieved the metal pole and the garbage bag. The bag contained items stolen from the Holley house. When Cartwright and Huguley were later arrested, Cartwright consented to a search of their residence. Police found more items stolen from Holley. When Burleson was arrested, police found a gun under the drivers seat of his car. Cook identified the gun as the one Huguley had taken from her house on the day of Steven's attack. Huguley and Burleson were both indicted, but the cases were severed. Cartwright testified at Burleson's trial, stating she was in the Holley home and Steven was alive. She went to wait in the car and saw Burleson (although it could have been Huguley) come out with the metal pole. The pathologist testified Steven's injuries were consistent with having been caused by the bar, which apparently came from the storm door. Both men brought several items to the car before leaving. Burleson was convicted and sentenced to life without parole.

HELD: (1) Although the State amended Burleson's indictment to include his status as a violent habitual offender, the State opted not to have him sentenced as an habitual offender. Regardless, the SCT found the amendment was improper. Burleson's had priors for burglary. The SCT held that burglary is not a per se crime of violence in 2011. There was no evidence indicating that one of Burleson's prior burglaries involved violence therefore the trial court erred in allowing the amendment.

(2) The trial court did not err in allowing the gun found in Burleson's car into evidence. Burleson failed to object, so the issue was waived. Notwithstanding the bar, Burleson's argument is without merit. The gun was relevant. While the State never argued that the gun was used in the commission of the crime, it had other probative value. Huguley and Burleson both were charged as principals in Steven's murder, so the State had the burden of proving either that Burleson committed the crime, or that he aided Huguley in its commission. Burleson's possession of the gun after the crime corroborated Cartwright's testimony that Burleson was present during the crime.

(3) The trial judge did abuse its discretion in failing to give a circumstantial evidence jury instruction. There was no direct evidence Burleson killed Steven during the commission of a robbery, and he did not confess. Because no one witnessed Steven's attack, it cannot be said that the State presented direct evidence that Burleson was a willing participant in the murder. The State presented no eyewitness testimony that Burleson took Steven's personal property from him by violence or by putting him in fear of immediate injury.

Cartwright's testimony proved only that Huguley and Burleson had taken items from the Holley's house, and the jury was left to infer from the rest of the evidence how they obtained those items. If the State attempts to prove, solely by circumstantial evidence, that the defendant killed the victim while engaged in the commission of a robbery, then the trial court is required to give a circumstantial-evidence instruction.

(4) The evidence was sufficient. Steven, Burleson, and Huguley were the only people inside the Holleys' house at the time of Steven's attack. Cartwright testified that she witnessed Burleson leaving the Holleys' house with a metal bar, and the pathologist opined that this bar was consistent with the type of blunt object that caused Steven's fatal injuries. Cartwright also testified that either Burleson or Huguley carried a television and other personal property out of the Holleys' house and placed those

items in her car. A handgun taken from Cook's house on the morning of the murder, was the same gun found in the car Burleson was driving on the day of his arrest.

Kitchens, J., Concurring in Part and in Result:

Justice Kitchens agreed that the trial court made a mistake in not granting Burleson a circumstantial evidence instruction. He also agreed the habitual offender amendment was improper. However, he disagreed that the handgun was relevant. There was no proof that decedent was shot or that he even saw the weapon. Burleson was irrevocably prejudiced by its admission.

Pierce, Justice, Dissenting:

Justice Pierce disagreed with the decision to reverse the case for failure to grant a circumstantial evidence instruction. He believed the instruction should be abolished like most other states have done. The circumstantial-evidence instruction serves no legitimate purpose and should no longer be used.

> Today, I would clarify for our jurisprudence that one standard of proof applies in all criminal cases in Mississippi: the State bears the burden of proving every element of the offense beyond a reasonable doubt.....I see no logical reason to continue to require trial courts to give an instruction that provides the jury with no legally relevant information, but serves only to confuse the jury's duty as the finder of fact.

He also believed the Court should not have addressed the habitual offender amendment issue, as the State decided not to pursue Burleson's sentence as an habitual offender. The SCT does not issue advisory opinions.

To read the full opinion, click here:
http://courts.ms.gov/Images/Opinions/CO102747.pdf

June 11, 2015

Andy Nicholas Brown v. State, No. 2013-KA-01585-SCT (Miss. June 11, 2015)

CASE: Murder
SENTENCE: Life

COURT: Calhoun County Circuit Court
TRIAL JUDGE: Hon. Robert William Elliott
TRIAL ATTORNEYS: Edward Lancaster, Jerry L. Stallings, Honey Ussery

APPELLANT ATTORNEY: Michael E. Robinson, George T. Holmes
APPELLEE ATTORNEY: Billy L. Gore

DISPOSITION: Affirmed. Pierce, Justice, for the Court. Kitchens and Chandler, JJ., Join this Opinion. Lamar and Coleman, JJ., Join this Opinion in Part.

ISSUES: (1) Whether Brown was provided effective assistance of counsel; (2) whether the trial court erred in failing to grant Brown's instructions; (3) whether the evidence was sufficient; (4) whether the trial court erred by denying Brown's motion to elicit testimony from the State's evaluating psychologist; and (5) whether there was cumulative error.

FACTS: Earlie D. Balford, 67, lived in a small trailer near the Pittsboro home of Annie D. Brown. Annie shared the home with her two sons. One son, Andy, was 28 and attending a local community college. Balford solicited odd jobs from local businesses, churches, and people around Grenada. Annie normally cooked dinner for herself and her two sons each night, while all three worked on their college homework. When Annie Brown cooked for her family, she also set aside a dinner portion for Balford that either Andy or her other son delivered to Balford nightly. On April 18, 2012, she sent Andy to Blaford with a plate of food around 7pm. Brown claimed that when he knocked on the door, Balford attacked him with a screwdriver. Balford put his hands around Brown's neck and pulled him inside the trailer. Balford fell on a couch near the door with Brown on top of him. Brown claimed he feared Balford was going to choke him to death. He was able to get the screwdriver and stabbed Balford. He then went home and told his mother to call 911. Balford was stabbed 18 times. An officer testifed Brown told him he killed Balford because he talked too much. Brown later wrote a letter to Balford's family apologizing for murdering him. Brown was subsequently found competent to stand trial. Brown testified and claimed he stabbed Balford in self-defense. He also said Balford tried to solicit sex from him earlier that day. Brown was convicted and appealed.

HELD: (1) Brown claimed his trial counsel should have encouraged him to testify to Balford's alleged history of sexual abuse and Balford's attempt to commit a felony by seeking to molest Brown prior to his death. He claimed introduction of such facts would have supported manslaughter and self-defense instructions on Brown's behalf. However, there was enough evidence to support these instructions and they were given. Further, counsel did assert the State failed to prove the necessary elements for murder.

(2) The trial court did not err in failing to grant several defense instructions on self-defense and manslaughter. However, he was granted sufficient instructions regarding these. Brown's instructions were redundant.

(3) Brown was not entitled to a directed verdict under *Weathersby*. Brown claimed the State failed to prove malice. However, Brown offered no excuse or justification other than his own testimony that Balford was strangling him. Balford was stabbed 18 times. Brown was an athletic 28-year-old, while Balford was a small and 67 years old. Officers did not observe defensive or other wounds while interrogating Brown. He told an officer he had killed Balford because he "talked too much." Another witness testified Balford planned to move to another neighborhood because the neighborhood kids were becoming violent. Finally, the jury considered Brown's letter, apologizing to Balford's son for "murdering" Balford. The jury could conclude that this evidence substantially contradicted Brown's self-defense claims.

(4) Dr. Criss Lott testified that Brown was competent. He also said it did not appear he was trying to misrepresent anything and was being truthful. Brown sought to introduce this testimony at his trial to show his propensity for truthfulness. The trial judge did not err in refusing to allow this testimony. Dr. Lott was admitted as an expert in psychiatry and not as a character witness. Dr. Lott said only that

Brown appeared to be truthful with respect to his sanity and competence to stand trial. He offered no opinion regarding Brown's truthfulness concerning Balford's death.

(5) There was no cumulative error.

Dickinson, Presiding Justice, Concurring in Part and in Result:

Justice Dickinson agreed that the State's evidence substantially contradicted Brown claims, and therefore he was not entitled to a directed verdicted under *Weathersby*. However, he believed the majority went too far in its efforts to explain why the State's evidence contradicted that theory, including evidence that was consistent with claims of self-defense. Brown's statement to police and lack of defensive wounds sufficiently contradicted Brown's testimony to survive the *Weathersby* rule and create a jury issue.

To read the full opinion, click here:
http://courts.ms.gov/Images/Opinions/CO102739.pdf

June 18, 2015

Mack Arthur King v. State, No. 2014-KA-00340-SCT (Miss. June 18, 2015)

CASE: Capital Murder Resentencing
SENTENCE: Life w/o Parole

COURT: Lowndes County Circuit Court
TRIAL JUDGE: Hon. Lee Sorrels Coleman
TRIAL ATTORNEYS: Rhonda R. Hayes-Ellis, Stacy L. Ferraro, Merrida P. Coxwell, Jr.
DISTRICT ATTORNEY: Forrest Allgood

APPELLANT ATTORNEY: Stacy L. Ferraro
APPELLEE ATTORNEY: Jeffrey A. Klingfuss

DISPOSITION: Vacated and Remanded. Lamar, Justice, for the Court. Waller, C.J., Dickinson and Randolph, P.JJ., Kitchens, Chandler, Pierce, King and Coleman, JJ., Concur.

ISSUE: Whether the circuit court erred in resentencing King to life without parole.

FACTS: Mack Arthur King was convicted of the 1980 capital murder of Lela Patterson and was sentenced to death in 1981. After numerous appeals, he was resentenced to death in 2003. In 2013, a federal court found that King was intellectually disabled and therefore ineligible for execution. On remand, the State sought a life without parole sentence under §99-19-107. King objected, arguing that the only sentencing options available at the time he committed the crime were death and life. The circuit court disagreed, finding no violation of ex post facto laws. King appealed his life without parole sentence.

HELD: This issue was recently addressed in *Bell v. State*, 160 So. 3d 188 (Miss. 2015). The resentencing to life without parole provision of §99-19-107 does not apply to King. The death penalty was not declared unconstitutional. King was simply ineligible for the death penalty due to his mental retardation. King must be sentenced to life, because death and life were the only two sentencing options available at the time King was convicted and sentenced.

To read the full opinion, click here:
http://courts.ms.gov/Images/Opinions/CO103850.pdf

July 2, 2015

Vance Drummer v. State, No. 2012-CT-02004-SCT (Miss. July 2, 2015)

CASE: Grand Larceny x2 and one count of Attempted Grand Larceny
SENTENCE: 10 years on each count, with the Count I to run consecutively to Count II, but concurrently with Count III, all as an habitual offender

COURT: Lowndes County Circuit Court
TRIAL JUDGE: Hon. James T. Kitchens, Jr.
TRIAL ATTORNEYS: Gary Goodwin, Forrest Allgood
DISTRICT ATTORNEY: Forrest Allgood

APPELLANT ATTORNEY: George T. Holmes
APPELLEE ATTORNEY: Lisa L. Blount

DISPOSITION: Affirmed in Part and Reversed in Part. Sentence Vacated and Remanded for Resentencing. Kitchens, Justice, for the Court. Part I: Waller, C.J., Lamar, Chandler and King, JJ., Concur. Randolph, P.J., Concurs in Part II and Dissents in Part I with Separate Written Opinion Joined by Dickinson, P.J., Pierce and Coleman, JJ. Coleman, J., Concurs in Part II and Dissents in Part I with Separate Written Opinion Joined by Dickinson and Randolph, P.JJ., and Pierce, J. Part II: Waller, C.J., Lamar, Chandler, Pierce and Coleman, JJ., Concur. Kitchens, J., Concurs in Part I and Dissents in Part II with Separate Written Opinion Joined by Dickinson, P.J., and King, J. Coleman, J., Concurs in Part II and Dissents in Part I with Separate Written Opinion Joined by Dickinson and Randolph, P.JJ., and Pierce, J.

ISSUES: (1) Whether the trial court erred in sentencing Drummer as an habitual offender, and (2) whether a flight instruction was proper.

FACTS: Around 3:55 a.m. on January 2, 2009, Officer Happ Anderson witnessed a vehicle run through a four-way stop in Mathiston. The vehicle, a white utility van, was pulling a trailer loaded with a John Deere lawnmower. The driver refused to stop and a high-speed chase ensued. The driver finally ran into a light pole trying to evade a roadblock. He fled into a nearby shed. He came out only after a police dog was sent in. Vance Drummer was the only individual in the shed. The white van had been stolen from Thompson Truck Center in Columbus. The trailer and John Deere lawnmower were both stolen from Agri-Turf, located about a mile down the road from Thompson Truck Center. Another truck located at Thompson's had sustained interior damage when someone had apparently

tried to start the vehicle without a key. Drummer was charged and convicted of two counts of grand larceny and one count of attempted grand larceny. Drummer was also charged as an habitual offender based on his prior offenses of felony fleeing in Webster County, and an unrelated motor vehicle theft in DeSoto County. Drummer objected, arguing the felony-flight conviction grew out of the asportation element of Count I of his indictment, the grand larceny of Agri-Turf's trailer and lawnmower. He claimed the felony flight was actually a continuation of his alleged larceny and was not a separate crime for habitual offender purposes. The trial judge disagreed, and the COA affirmed. *Drummer v. State*, No. 2012-KA-02004-COA (Miss.Ct.App. July 15, 2014). The SCT granted certiorari.

PART I HELD: (1) The trial court erred in sentencing Drummer as an habitual offender.

> Because Drummer's flight was so inextricably intertwined with his commission of larceny that the trial court found a flight instruction to be proper, it is obvious that the same flight could not be used as a predicate felony "arising out of" a separate incident for the purpose of habitual-offender sentencing.

Section 99-19-81 requires both that the predicate felonies be separate from each other *and* from the felony for which the defendant currently is being sentenced. The State's argument at trial to justify a flight instruction, was that the flight from police was related to the larcenies.

"Having taken the position that flight was sufficiently probative of Drummer's guilt on the larceny charges to warrant a flight instruction, the State could not credibly argue that the flight failed to arise from a common nucleus of operative fact."

The felony-fleeing conviction was not available to the State as a predicate felony for purposes of habitual-offender sentencing because it arose from the same incident as the larceny for which Drummer was being sentenced.

PART II HELD: (2) The COA did not err in finding the flight instruction proper. The record provides no evidence that would support an independent reason or basis for Drummer's flight from police. Drummer's claim on appeal that he fled to avoid a ticket for running a stop sign was not legally sufficient in light of the facts. Likewise, Drummer's claim that the flight provided the asportation element of the offense of larceny, thereby providing an independent reason for flight, is without merit.

> Drummer's acts involving a high-speed chase to avoid apprehension by lawful authorities, evasion of a roadblock and multiple officers, fleeing on foot after the stolen vehicle he was driving was incapacitated, and finally hiding in a shed are at least "somewhat probative" of guilty knowledge.

Randolph, Presiding Justice, Concurring in Part II and Dissenting from Part I:

Justice Randolph believed Drummer was properly sentenced as an habitual offender. A plain reading of § 99-19-81 leads to the conclusion that the prior felonies are required need only to be separate and distinct from each other. There has never been a requirement that the present charge be separate from

the priors. There is no requirement that the present offense must be committed after the prior conviction.

> Although the prior felony fleeing occurred on the same day as the present grand larceny, it was separately brought and arose out of a separate incident from the other prior conviction of felony taking. The requirements of the statute were met. Following the rules of statutory interpretation, Drummer's sentence as a habitual offender was proper.

Kitchens, Justice, Concurring with Part I and Dissenting from Part II:

Justice Kitchens dissented from Part II, arguing that the flight instruction should be abolished.

> Ultimately, flight instructions are antithetical to a trustworthy and efficient justice system. In the best light, the prosecutor's ability to obtain an instruction allowing for a jury to "infer guilt" from a guilty criminal defendant's fleeing is cumulative to the State's obligation to prove every element of an indicted offense beyond a reasonable doubt....Thus, those prosecutors who persist in asking for flight instructions impose a huge burden on the judicial system in exchange for no reciprocal benefit whatsoever. Most offensively, flight instructions can be used to impute guilt on innocent defendants, a fact which is intolerable to prevailing concepts of fairness and justice.

Coleman, Justice, Concurring with Part II and Dissenting from Part I:

Justice Coleman believed it was proper to sentence Drummer as an habitual offender. He believed §99-19-81 requires only that the two predicate felonies be separate. The statute contained no requirement that either predicate felony arise "out of separate incidents at different times" from the primary felony. He submits that the majority has written into the statute a requirement the Legislature did not.

To read the full opinion, click here:
http://courts.ms.gov/Images/Opinions/CO104518.pdf

Kenneth M. Crook v. State, No. 2013-CT-00081-SCT (Miss. January 8, 2015)

CASE: Misdemeanor - Violation of City Ordinance for Rental License
SENTENCE:

COURT: Madison County Circuit Court
TRIAL JUDGE: Hon. John Huey Emfinger
TRIAL COURT ATTORNEYS: Steve C. Thornton, John Hedglin
DISTRICT ATTORNEY: Michael Guest

APPELLANT ATTORNEY: Steve C. Thornton
APPELLEE ATTORNEY: John Hedglin

DISPOSITION: Reversed and Rendered. Chandler, Justice, for the Court. Waller, C.J., Lamar, Kitchens and King, JJ., Concur. Coleman, J., Concurs in Part and Dissents in Part with Separate Written Opinion Joined by Randolph, P.J., and Pierce, J.; Waller, C. J., Joins in Part. Dickinson, P.J., Not Participating.

ISSUE: Whether the warrant provision of the City of Madison's rental license ordinance was constitutional.

FACTS: On July 15, 2008, Madison adopted a city ordinance entitled "Rental Inspection and Property Licensing Act" (RIPLA). RIPLA requires owners of single-household or multiple-household dwellings located in the City to obtain a rental license in order to rent a property. The ordinance requires a $100 licensing fee and a $10,000 bond per rental unit. As a condition to the issuance of the rental license, owners must consent to inspections of all portions of the premises and dwelling by building officials. The purpose of the inspections is to ensure compliance with RIPLA. Crook initially paid the $100 but did not get a bond for a home located on Cypress Drive. Crook later told the City he would be residing there, therefore exempting the property from RIPLA. When the City alleged he was later improperly renting the property, he claimed he had entered into an option-to-purchase contract with Tammy Thompson for the property. Crook was subsequently arrested for failing to obtain a proper license. He was convicted in Madison Municipal Court. Thompson testified she never intended to purchase the home and Crook knew of her intentions. She admitted that Crook instructed her not to tell anyone it was a rental home and that Crook would sometimes ask to spend the night on the couch, so he could give the appearance that he was occupying the home. He was again convicted and his convictions were affirmed by the Circuit Court. The COA affirmed, holding that the advance consent to inspect provisions of the ordinance were not facially unconstitutional since the ordiance required a subsequent judicial search warrant for refusal. ***Crook v. State***, No. 2013-KM-00081-COA (Miss.Ct.App. September 30, 2014). The SCT granted certiorari.

HELD: The COA and the lower courts erred in affirming Crook's appeal. His conviction is reversed and rendered.

> RIPLA's inspection provisions are constitutionally defective because, although RIPLA has a warrant provision, that provision allows a warrant to be obtained "by the terms of the Rental License, lease, or rental agreement," which is a standard less than probable cause.

There have been several courts which have addressed ordinances that forced owners to consent in advance to property inspections. Numerous cases have held these ordinances to be unconstitutional because they did not contain a warrant provision. In other cases, ordinances requiring advance consent to search have been upheld because the ordinances required the government to obtain a warrant if the owner refused consent, and the ordinances did not exact criminal penalties for lack of consent.

In this case, RIPLA allows a judicial officer to issue a warrant "by the terms of the Rental License, lease, or rental agreement," rather then upon probable cause. Because each rental license contains the owner's advance consent to inspections, a significant danger exists that a building official could attempt to obtain a warrant by asserting the owner's advance consent. However, probable cause must be the standard.

Because RIPLA's warrant provision authorizes the issuance of a warrant without probable cause, it is unconstitutional. And because RIPLA lacks a valid warrant provision, its inspection provisions are unconstitutional. RIPLA contains a warrant procedure, but that procedure is constitutionally deficient because it expressly allows a warrant to issue without probable cause.

> Crook was convicted of renting property without a rental license in violation of RIPLA. To obtain a rental license, RIPLA required Crook to give advance consent to a warrantless search. This he did not do, and he was convicted of renting his property without a license. Because Crook was convicted of renting property without a license, a license that was unconstitutionally conditioned upon advance consent to a warrantless search, Crook's conviction must be reversed.

Coleman, Justice, Concurring in Part and Dissenting in Part:

Justice Coleman agreed that the advance consent provision of the ordinance to be facially unconstitutional. However, he believed Crook's conviction should be upheld. Crook was convicted of renting property without a rental license under RIPLA. Although Crook submitted a rental license application, he failed to post the bond and therefore was never issued a rental license. Thus, Crook never gave advance consent to an inspection, and his conviction should be upheld.

To read the full opinion, click here:
http://courts.ms.gov/Images/Opinions/CO103128.pdf

Michael Deon Taylor v. State, No. 2013-CT-00305-SCT (Miss. January 8, 2015)

CASE: Possessing Stolen Property
SENTENCE: 10 years as an habitual offender

COURT: Madison County Circuit Court
TRIAL JUDGE: Hon. William E. Chapman, III
TRIAL COURT ATTORNEYS: Thomas R. Mayfield, George McDowell Yoder, III, Catouche Body
DISTRICT ATTORNEY: Michael Guest

APPELLANT ATTORNEY: Damon Ramon Stevenson
APPELLEE ATTORNEY: Stephanie Breland Wood

DISPOSITION: Reversed and Remanded. Chandler, Justice, for the Court. Waller, C.J., Dickinson, P.J., Lamar, Kitchens, Pierce, King and Coleman, JJ., Concur. Randolph, P.J., Concurs in Result Only Without Separate Written Opinion.

ISSUE: Whether Taylor was denied effective assistance of counsel.

FACTS: During June 2011, Alex Walker, the owner of Jackson Tree Service, called Puckett Machinery and requested that a mechanic come to a job site in Madison County to fix a "skid steer." In trying to diagnose the problem, the serial number was entered into the company's computer system,

and it indicated that the skid steer had been stolen. Walker claimed that he had bought the skid steer at the Whataburger restaurant in Ridgeland from a white male with long hair and a tattoo of a jack-o-lantern. The following day, Walker told the investigators that he bought the skid steer from a black male named "Mike." Investigators showed Walker a picture of Michael Taylor. Walker confirmed that Taylor was the person who sold him the skid steer at Whataburger. Authorities searched Taylor's cell phone and discovered pictures of a skid steer. Taylor testified he had known Walker for about two years, and he had occasionally worked for Walker's company. Taylor testified that Walker had used the skid steer when he worked for him. Taylor also testified that he did not sell the skid steer to Walker, and he did not know how Walker obtained it. Taylor claimed that Walker had sent him the pictures of the skid steer that were recovered from his cell phone. At trial, defense counsel withdrew a motion in limine to prohibit introduction of Taylor's prior criminal record. However, counsel withdrew the motion when Taylor took the stand. Counsel did not object when the prosecutor cross-examined Taylor, in detail, regarding several prior convictions (sale and possession of cocaine, burglary, alteration of a motor vehicle VIN, felon in possession of a firearm, and auto burglary). The COA affirmed the merits of Taylor's conviction and sentence, while leaving the question of ineffective assistance of counsel for post-conviction. *Taylor v. State*, No. 2013-KA-00305-COA (Miss.Ct.App. July 22, 2014). The SCT granted certiorari.

HELD: The SCT found that defense counsel's failure to object to the expansive inquiry into Taylor's prior convictions constituted ineffective assistance of counsel apparent from the record. His conviction was reversed and his case remanded for a new trial.

Taylor's right to a fair trial was compromised by defense counsel's withdrawal of the Motion in Limine regarding Taylor's criminal history and by failure to object to the State's extensive cross-examination regarding Taylor's prior convictions. Counsel stipulated Taylor was a felon. A defendant's choice to testify in his defense does not eliminate the protection of MRE 404(b). Neither does a defendant's willingness to stipulate to felon status to satisfy impeachment under Rule 609(a)(1)(B).

> In a criminal trial on the lone charge of possession of stolen property, where the State's prime witness previously had changed his story to police about which individual he purchased the stolen property from, we cannot conceive a trial strategy that would justify failure to object to the introduction and detailed description of the defendant's seven or eight previous felony convictions. The State's extensive cross-examination regarding Taylor's numerous past felony convictions was clearly more prejudicial than probative in a case that largely turned on the respective credibility of Taylor and the State's main witness.

To read the full opinion, click here:
http://courts.ms.gov/Images/Opinions/CO103695.pdf

July 23, 2015

John Lee Franklin v. State, No. 2013-KA-01880-SCT (Miss. July 23, 2015)

CASE: Arson

SENTENCE: 18 years

COURT: Scott County Circuit Court
TRIAL JUDGE: Hon. Marcus D. Gordon
TRIAL ATTORNEYS: Christopher A. Collins, Steven Kilgore

APPELLANT ATTORNEY: Edmund J. Phillips, Jr.
APPELLEE ATTORNEY: Stephanie Breland Wood
DISTRICT ATTORNEY: Mark Sheldon Duncan

DISPOSITION: Affirmed. Pierce, Justice, for the Court. Waller, C.J., Randolph, P.J., and Chandler, J., Concur. Lamar and Coleman, JJ., Concur in Part and in Result Without Separate Written Opinion. Kitchens, J., Concurs in Part and Dissents in Part with Separate Written Opinion Joined by Dickinson, P.J., and King, J.

ISSUES: (1) Whether the trial court erred in assessing restitution; and (2) whether the trial court erred in admitting Franklin's confession into evidence.

FACTS: John Lee Franklin and his girlfriend, Amanda Ormond, lived together with their children in a house they rented on West Fourth Street in Forest, MS. The couple started having relationship problems, and Franklin began spending several nights sleeping in his car. One day in September 2012, Amanda drove to Meridian to pick up her friend, Scott Smith. Around 10:45 p.m., Amanda, Scott, and Amanda's one-year-old son Jacoby, drove back to Amanda's house on West Fourth Street. Scott put Jacoby to bed and sat down to watch television. Around 1:20 a.m., Amanda left to take her some keys back to her sister's house. Scott heard banging coming from the back door near the laundry/utility room. When Amanda arrived home minutes later, Scott told her about the noise. Amanda opened the door to the laundry/utility room and saw flames. Everyone escaped from the house and they called 911. Both Amanda and Scott saw Franklin running from behind the house as they waited for the firemen to arrive. The fire was later determined to be incendiary, and Franklin was arrested. He told police he was upset when he saw another man in the house with Amanda and his child. He said he "lost it," and soaked a pair of longjohns in gas, lit them and threw them into the attic of the house.

HELD: (1) The claim is barred for failing to object to the order of restitution at sentencing. Regardless, the trial judge properly followed § 99-37-3(1), and determined the amount of damage from the crime and Franklin's ability to pay. There was no error in ordering restitution.

(2) The trial judge did not err in failing to suppress Franklin's statement to police. At some point near the end of Franklin's statement, he told the investigator he needed help. The investigator believed Franklin meant he need "health" help, and not that he was requesting an attorney to help him. The trial judge agreed. There was no abuse of discretion. The plurality went on to state that Franklin's statement that he needed "help" was insufficient to invoke his right to counsel.

The plurality also challenged the dissent's assertion that the Mississippi Constitution gives greater rights to criminal suspects who invoke the right to counsel during custodial interrogations than does the U.S. Constitution. Prior opinions have erroneously advised that the Mississippi Constitution

mandates when the right to counsel attaches. The Mississippi Constitution does not, but Mississippi statutory law does so in § 99-1-7.

> Never has this Court held that the Mississippi Constitution provides greater protection than the U.S. Constitution to criminal suspects who invoke the right of counsel during custodial interrogations. Indeed, have we consistently used federal cases as guidance with regard to the *Edwards* rule.

Kitchens, Justice, Concurring in Part and Dissenting in Part:

Justice Kitchens dissented in part, taking issue with the plurality's opinion that the Court has never held the Mississippi Constitution provides greater protections to criminal suspects' invocation of counsel during interrogations than does the U.S. Constitution. He did agree that, in this case, Franklin's request for "help" was insufficient to invoke counsel.

> ...I decline to endorse the plurality's logic, which relies upon incorrect statements of Mississippi law and inapplicable federal precedents. Instead, I respectfully provide the correct analysis of Franklin's invocation of counsel under the Mississippi Constitution and this Court's precedent in *Downey* [*v. State*, 144 So. 3d 146 (Miss. 2014)] and *Holland* [*v. State*, 587 So. 2d 848 (Miss. 1991)].

To read the full opinion, click here:
http://courts.ms.gov/Images/Opinions/CO102976.pdf

Franklin Fitzpatrick v. State, No. 2014-KA-00252-SCT (Miss. July 23, 2015)

CASE: Capital Murder
SENTENCE: Life w/o Parole

COURT: Tippah County Circuit Court
TRIAL JUDGE: Hon. Andrew K. Howorth
TRIAL ATTORNEY: Joshua A. Turner

APPELLANT ATTORNEY: Justin T. Cook, George T. Holmes
APPELLEE ATTORNEY: LaDonna C. Holland
DISTRICT ATTORNEY: Ben Creekmore

DISPOSITION: Affirmed. Waller, Chief Justice, for the Court. Randolph, P.J., Lamar, Chandler and Pierce, JJ., Concur. Kitchens, J., Dissents with Separate Written Opinion Joined by Dickinson, P.J., King and Coleman, JJ.

ISSUES: (1) Whether the jury instruction allowed for conviction without a proper showing of the requisite mental state, (2) whether the trial court erred when it overruled Fitzpatrick's motion for new trial based on the weight of the evidence, and (3) whether Fitzpatrick is procedurally barred from challenging the elements jury instruction on appeal because he did not object to it at trial.

FACTS: On December 2, 2010, Franklin Fitzpatrick, along with Joani Clifton, purchased a synthetic stimulant commonly referred to as "bath salts" from a convenience store. After consuming the drug, along with some marijuana and crystal methamphetamine, Fitzpatrick began to act erratic. He began sweating, hallucinating, "talking out of his head," and claiming to see the devil. He then began to fight with Matt Thrasher, a friend of Clifton's. Police were called. Deputy Rodney Callahan was the first officer on the scene. Callahan testified that Fitzpatrick kept pacing back and forth, licking his lips, and asking Callahan to pray with him. Fitzpatrick kept saying that he thought the devil was "coming to get" him. Callahan described Fitzpatrick as irrational and hallucinating. Callahan called for an ambulance. Deputy Dewayne Crenshaw subsequently arrived on the scene. The deputies concluded it was best for his and their own safety if they restrained Fitzpatrick. Fitzpatrick resisted, and a scuffle ensued. During this encounter, Fitzpatrick gained control of Callahan's service weapon and used it to kill Deputy Crenshaw. When the paramedics arrived, they joined the struggle to subdue Fitzpatrick. It took four or five people to bring Fitzpatrick under control. Fitzpatrick later told police he had no memory of the shooting.

HELD: (1) Fitzpatrick argued that the trial court erred in not requiring a finding of deliberate design or malice aforethought for the murder of a police officer. The jury was allowed to find Fitzpatrick guilty of capital murder if he acted with either deliberate design or a depraved heart. This was the correct legal standard. Murder of a peace officer under § 97-3-19(2)(a) does not require a showing of malice aforethought or deliberate design. Where depraved heart is sufficient for a conviction as a matter of law, a showing of deliberate design is not required.

(2) The verdict was not against the weight of the evidence. Fitzpatrick argued that because of his extreme intoxication, he was unable to form the mental state required for a deliberate-design murder, and at most was guilty of depraved-heart murder. However, as discussed in Issue 1, deliberate-design murder and depraved-heart murder have coalesced, and therefore, Fitzpatrick's argument is without merit.

(3) Fitzpatrick claimed it was plain error that the jury was not instructed that the State was required to prove he murdered Deputy Crenshaw with deliberate design. As discussed above, the jury was properly instructed.

Kitchens, Justice, Dissenting:

Justice Kitchens dissented, arguing the instructions relieved the prosecution from proving deliberate design murder of a police office by allowing a guilty verdict based on a finding of deliberate design or depraved heart. Fitzpatrick was indicted for deliberate design murder. The jury improperly rendered a general verdict. It is impossible to tell which ground the jury selected, deliberate design murder (for which Fitzpatrick had been indicted) or depraved heart murder. He would reverse for a new trial.

To read the full opinion, click here:
http://courts.ms.gov/Images/Opinions/CO102916.pdf

August 6, 2015

Damon Samhal Fagan v. State, No. 2014-KA-00458-SCT (Miss. August 6, 2015)

CASE: Sexual Battery x4
SENTENCE: 30 years, with 10 years PRS

COURT: Jackson County Circuit Court
TRIAL JUDGE: Hon. Dale Harkey
TRIAL ATTORNEYS: Angel Myers, Kathryn Van Buskirk, Adrianne Crawford, Michael Cunningham

APPELLANT ATTORNEY: George T. Holmes, Phillip W. Broadhead
APPELLEE ATTORNEY: Billy L. Gore
DISTRICT ATTORNEY: Anthony N. Lawrence, III

DISPOSITION: Affirmed. Lamar, Justice, for the Court. Waller, C.J., Dickinson and Randolph, P.JJ., Kitchens, Chandler, Pierce, King and Coleman, JJ., Concur.

ISSUES: (1) Whether the evidence was sufficient to support the verdict, and (3) whether the verdict was against the overwhelming weight of the evidence.

FACTS: In September 2012, Bryan Davis told police that Damon Fagan had sexually abused his niece (K.D.) several years before. Fagan lived with Bryan's sister, Nakeia, "on and off" from around 2001 until around 2010. After speaking with Bryan, Nakeia, K.D., K.D.'s siblings, and Fagan, the police arrested Fagan. K.D. testified that she was in the fourth grade the first time Fagan abused her. She was "supposed to be getting a whipping for getting in trouble at school," but instead, Fagan "put his mouth on [her] vagina." K.D. testified that she was going into the fifth the second time Fagan abused her. She testified that Fagan again put his mouth on her vagina. K.D. was in the sixth grade the third time Fagan abused her, and the same thing occurred then. K.D. also testified that Fagan stuck his penis in her mouth once, but she did not remember during which incident that occurred. Fagan did not say anything to K.D. during the incidents, but he told her once that "if [she] told he would kill [her] and [her] family." K.D. identified Fagan as her abuser from the witness stand. K.D. said she told her mother about each incident, but nothing with done. She said her mother actually witnessed one of the incidents and threw Fagan out of the house. Her uncle finally reported the abuse. Fagan first denied the allegations, but later asked police for leniency and forgiveness, admitting he had made a mistake.

HELD: (1) and (2) K.D. testified clearly that Fagan had abused her at least four times. She testified that his mouth was on the "inside" of her vagina, and that he had partially inserted his penis into her mouth. Nakeia testified that K.D. had told her about the abuse a couple of times and that she personally had observed an incident that was "sexual in nature." Nakeia admitted that she initially told the police that K.D. was lying, but she then told the jury about her two convictions for accessory after the fact and hindering the prosecution. Fagan claimed K.D. was unreliable given the time lapse between the incidents and when they were reported to police, and that she had a motive to lie to take the focus off herself when she told her family she was questioning her sexuality. A rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

To read the full opinion, click here:
http://courts.ms.gov/Images/Opinions/CO105868.pdf

Christopher Lee Baxter v. State, No. 2012-CT-01032-SCT (Miss. August 6, 2015)

CASE: Capital Murder
SENTENCE: Life w/o Parole

COURT: George County Circuit Court
TRIAL JUDGE: Hon. Richard W. McKenzie
TRIAL ATTORNEYS: Anthony N. Lawrence, III, Cherie Wade, Thomas M. Fortner, William B. Kirksey

APPELLANT ATTORNEY: Stacy L. Ferraro
APPELLEE ATTORNEY: Elliott George Flaggs
DISTRICT ATTORNEY: Anthony N. Lawrence, III

DISPOSITION: COA Affirmed. Waller, Chief Justice, for the Court. Dickinson and Randolph, P.JJ., Lamar, Chandler and Coleman, JJ., Concur. Kitchens, J., Dissents with Separate Written Opinion Joined by King, J. Pierce, J., Not Participating.

ISSUES: (1) Whether the instructions on accomplice liability confused the jury and relieved the State's of its burden of proof, and (2) whether the trial court erred in admitting Baxter's confession.

FACTS: On July 19, 2010, Christopher Lee Baxter failed to appear for his sentencing hearing for manufacture and possession of methamphetamine. On July 21st, Sheriff Gary Welford told Deputy Bobby Daffin to be on the lookout for Baxter. Daffin knew Baxter and his girlfriend, Brandy Williams, from their prior encounters with police. Later that day, Daffin saw Williams driving her father's truck in Lucedale. Daffin could see the arm of a passenger, who appeared to be leaning back in the seat in order to hide. He suspected the passenger was Baxter. As Daffin neared the truck, while it was stopped at a stop sign, the driver fled at a high rate of speed. After witnessing the truck pass several cars in a no-passing zone and force other vehicles off the road, Daffin initiated his blue lights to perform a traffic stop. The driver refused to stop, leading law enforcement on a 17-mile chase, with speeds reaching over 100 miles per hour. Sheriff Welford and several deputies set up a roadblock for the truck. The sheriff and deputies were wearing uniforms; and although their vehicles were unmarked, the vehicles' blue lights were activated. The truck accelerated through the intersection and swerved around the unmarked cars, striking Sheriff Welford. None of the officers could positively identify the driver at the time Welford was struck. The truck eventually crashed and the occupants fled. Baxter and Williams were found the following morning hiding in a trailer in the woods. Baxter later confessed and admitted to his participation in the high-speed chase, stating the he was the driver for the entire pursuit. He eventually admitted that Williams was initially driving, but explained that they switched seats before the sheriff was hit. He was adamant that Williams played no part in the crime, and was only acting at his direction. Both Baxter and Williams were charged with the capital murder of Sheriff Welford, and were tried separately. The COA affirmed Baxter's case, finding, *inter alia*, that the jury was properly instructed on the elements of capital murder and accomplice liability, and Baxter's confession was properly admitted. ***Baxter v. State***, No.

2012-KA-01032-COA (Miss.Ct.App. July 29, 2014). However, the COA found the same accomplice liability instruction reversible error in Williams's appeal. ***Williams v. State***, No. 2012-KA-01839-COA (Miss. Ct. App. Dec. 2, 2014). The SCT granted certiorari in Baxter's appeal.

HELD: (1) Baxter argued the COA ruled inconsistently regarding the accomplice liabilty instruction. He also argued, that the instruction allowed for a conviction if the jury concluded that his failure to appear for sentencing contributed to the sheriff's death. The instruction at issue, S-7, stated in part:

> ...it is not necessary that an unlawful act of the Defendant be the sole cause of death. Responsibility attaches if the act of the Defendant contributed to the death. If you believe the Defendant committed an unlawful act or aided and abetted another in committing an unlawful act that contributed to the death..., then the Defendant is not relieved of responsibility by the fact that other causes may have also contributed to his death.

The State argued to the jury that Baxter was either guilty as a principal if he was the driver, or as an aider and abettor if he was a passenger controlling and directing Williams. Baxter raised as a defense that the sheriff's department, by negligently continuing in a dangerous pursuit and by negligently conducting the roadblock, was equally responsible for the sheriff's death.

S-7 was an incorrect statement of aiding-and-abetting law. However, the jury was given two correct instructions regarding aiding and abetting. The instruction was offered in response to the defense claim that the actions of law enforcement contributed to the sheriff's death. "Given that aiding and abetting, as well as contributing causes, were issues in this trial, we cannot say, taking the instructions as a whole, that the jury was not fairly informed of the relevant law or that S-7 created an injustice."

Also, the instruction did not allow the jury to convict him for the sheriff's murder because he failed to appear at his sentencing hearing. Given the context of the case, when read with the other jury instructions, it is clear that the instruction is referring to the unlawful acts of evading law enforcement or encouraging another to do so. The overwhelming evidence at trial supported Baxter's conviction either as a principal or as an aider and abettor

Without giving an opinion on the COA's opinion in *Williams*, the Court went on to explain the difference regarding S-7. While both cases arise out of the same factual background, the context of S-7 is different as applied to Baxter and Williams. First, the objection to the instruction was different in each case. Second, Williams used the defense of abandonment. Baxter never claimed abandonment. Therefore, there was no danger that the jury could read S-7 as requiring Baxter to have to prove he abandoned his flight as the COA found in *Williams*.

(2) The trial court disallowed Baxter's confession in Williams's trial, but found no error in admitting it in Baxter's trial. The confession was hearsay in William's trial, offered as reliable exculpatory evidence, but the confession was offered as an admission in Baxter's trial. It was not hearsay if it was intelligently, knowingly, and voluntarily given. The Court found no error in the COA's opinion finding that the truthfulness of the confession was not a factor in determining its admissibility.

Baxter argued that his confession was not intelligently and voluntarily made because of his mental disability. However, a mental disability alone does not render a confession involuntary per se. The trial court clearly considered Baxter's low IQ. [In fact, he was determined to be ineligible for the death penalty because of it.] The court heard differing opinions on his ability to understand his *Miranda* rights. Accordingly, the SCT could not state that the trial court committed manifest error or that his ruling was against the overwhelming weight of the evidence.

Kitchens, Justice, Dissenting:

Justice Kitchens dissented, believing the decision by the jury was a general verdict. He believed it was possible the jury, based on S-7, found Baxter guilty because of his "unlawful act" of failing to appear for sentencing on drug charges before the police chase.

The crime of capital murder of a peace officer and the crime of aiding and abetting are different crimes with separate elements and separate *mens rea* requirements. Half the jury could have believed that Baxter had been driving and directly committed the capital murder of the sheriff, and half the jury could have believed that Baxter aided and abetted Williams's commission of the crime.
The unanimity of the jury remains in doubt. It can not be determined whether each element of the crime was found beyond a reasonable doubt. He would remand the case for a new trial.

To read the full opinion, click here:
http://courts.ms.gov/Images/Opinions/CO103998.pdf

August 20, 2015

Tommiel Q. Claiborne v. State, No. 2014-KA-00758-SCT (Miss. August 20, 2015)

CASE: Murder
SENTENCE: Life

COURT: Claiborne County Circuit Court
TRIAL JUDGE: Hon. Lamar Pickard
TRIAL COURT ATTORNEYS: M.a. Bass, Jr., Nickita Banks, Alexander Martin

APPELLANT ATTORNEY: George T. Holmes
APPELLEE ATTORNEY: Scott Stuart
DISTRICT ATTORNEY: Alexander C. Martin

DISPOSITION: Affirmed. Chandler, Justice, for the Court. Waller, C.J., Dickinson and Randolph, P.JJ., Lamar, Kitchens, Pierce, King and Coleman, JJ., Concur.

ISSUES: *Lindsey* brief. (1) Whether there were any *Brady* and/or discovery violations; (2) whether there was ineffective assistance of counsel; and (3) whether there was a speedy trial violation.

FACTS: Luna Claibore had filed for a divorce from her husband Tommiel Claiborne. A hearing was set for August 23, 2011. On August 22, 2011, Luna was living with Deborah and Cornelius

Thornton. Earlier in the day, Tommiel came by and stopped and talked to Luna. Deborah testified that Tommiel seemed to be trying to reconcile with Luna but that Luna did not want to talk with him. Tommiel left. Later, shortly after noon, Deborah heard something that sounded like a firecracker and heard Luna screaming for Deborah to call the police. Deborah saw Tommiel chasing Luna around a car. She saw Tommiel grab Luna by the neck and shoot her. Tommiel then stood over her and shot her a couple of more times, and walked away. Cornelius also witnessed the shooting, A third eyewitness, Willie Roy Parker, testified that he was sitting on his porch when he heard two gunshots. He looked around and saw Tommiel holding Luna. He also saw Tommiel shoot Luna in the head and several more times while she was on the ground. Claiborne was apprehended a few miles away later that afternoon. The gun was never recovered. Claiborne was found sane and competent to stand trial. He was convicted. On appeal, his appellant counsel filed a *Lindsey* brief, and Claibore filed a pro se brief.

HELD: (1) Claiborne argues that the State failed to disclose the results of a gunshot-residue test, and that the State violated the discovery rule by failing to give notice that it intended to put on testimony by the chancery clerk that Claiborne and the victim had a divorce hearing scheduled. The record indicates trial counsel stated that no gunshot residue evidence would be introduced "as a matter of trial strategy." It is not apparent from the record that the State possessed and suppressed evidence favorable to the defense. Claiborne has failed to demonstrate a *Brady* violation. Also, counsel only objected to the testimony of the clerk based on relevance. Therefore, Claiborne's claim on appeal is barred.

(2) Claiborne argued that he was denied effective assistance of counsel. He asserts that trial counsel had a conflict of interest because trial counsel would not file certain motions Claiborne wanted him to file or call an expert he wanted to testify. Claiborne points to nothing in the record to support a finding that defense counsel failed to subpoena a witness whose testimony would be favorable and that, if the omission had not occurred, the outcome at trial likely would have been different. Because these issues of ineffective assistance of counsel are not based on facts fully apparent from the record, the Court dismissed them without prejudice to Claiborne's ability to raise them on PCR.

(3) Claiborne also argued that he was denied the right to a speedy trial. The record reflects that the trial, initially scheduled for a few days after arraignment, was delayed due to Claiborne's request for a mental evaluation and his repeated failure to cooperate with the doctor who was immediately available to perform the evaluation. The trial took place within two months after he completed a mental evaluation. The length of delay did not affect the ability of three eyewitnesses to testify at trial. A balancing of the *Barker* factors leads to the conclusion that Claiborne was not denied the right to a speedy trial.

To read the full opinion, click here:
http://courts.ms.gov/Images/Opinions/CO106297.pdf

Scott Herman Bates v. State, No. 2013-CT-00097-SCT (Miss. August 20, 2015)

CASE: Simple Assault on a LEO
SENTENCE: 5 years

COURT: Hinds County Circuit Court
TRIAL JUDGE: Hon. Jeff Weill, Sr.
TRIAL COURT ATTORNEYS: Brad Hutto, Gale Walker, Kevin Camp, Molly Poole

APPELLANT ATTORNEY: Kevin Dale Camp, Jared Keith Tomlinson
APPELLEE ATTORNEY: Laura Hogan Tedder
DISTRICT ATTORNEY: Robert Shuler Smith

DISPOSITION: COA Affirmed. Pierce, Justice, for the Court. Waller, C.J., Dickinson and Randolph, P.JJ., Lamar, Chandler and Coleman, JJ., Concur. King, J., Dissents with Separate Written Opinion Joined by Kitchens, J.

ISSUE: Whether the evidence was sufficient to support a finding that the deputy was acting within the scope of his duty, office, or employment as a law-enforcement officer at the time of the assault.

FACTS: Hinds County Deputy Sheriff James Cox was moonlighting as a security guard at Reed Pierce's restaurant. Cox was working at the restaurant in his official uniform, with the sheriff's approval. Scott Herman Bates was a patron at the restaurant. Bates continued to hang around the restaurant after it closed. The manager told Cox to ask Bates to leave. Bates refused to leave. He shouted at Cox, taunting him that only his uniform protected him from a beating at Bates's hands. He also threatened to have Cox fired for the sheriff's department. Only after two more security guards stepped in did Bates leave the restaurant. Concerned that Bates may be up to something, Cox and the two other guards followed Bates into the parking lot. Outside, Bates kept threatening to beat up Cox and ruin his career. Instead of driving out of the parking lot, Bates drove towards Deputy Cox and the two other guards. He made a sharp turn so that his truck was broadside to them. He fired his gun, and then sped off. Cox, joined by other deputies, pursued Bates and he was eventually arrested. Police recovered a .38 revolver and a spent shell casing in his truck. Bates was charged with aggravated assault of a law enforcement officer. At trial, Bates admitted his gun went off in the parking lot, but claimed it had been triggered by accident. He was convicted of the lesser-included offense of simple assault of a LEO. The COA held there was sufficient evidence to show Cox was acting in the scope of his duties and affirmed. ***Bates v. State***, No. 2013-KA-00097-COA (Miss.Ct.App. August 5, 2014). The MSSCT granted certiorari.

HELD: The COA was affirmed. The State presented evidence that, while working as a private security guard, Deputy Cox was in full uniform and working at the private establishment with the approval of his sheriff. While Cox's initial request that Bates leave was on behalf of the restaurant, Bates's hostile reaction triggered Cox to switch into law-enforcement mode.

> ...Bates became disorderly, repeatedly threatened physical violence against Deputy Cox, and then fired his gun. This conduct is exactly what the Legislature had in mind with the enactment of Mississippi Code Section 97-3-7(1)(b) (enhancing penalty when the victim is a law-enforcement officer or other enumerated protected class).

Bates clearly was aware that Deputy Cox was a police officer, and the evidence presented sufficiently supports the jury's finding that Deputy Cox was acting within the scope of his duty as a law-enforcement officer when Bates assaulted him.

King, Justice, Dissenting:

Justice King dissented, believing that Cox was not acting within the scope of his office or duty at the time the assault occurred. "...[W]hether Officer Cox was acting within the scope of his duty or office depends on whether he was performing a *legal duty* associated with his office, or was engaging in a personal task of his own." Under Mississippi's assault statute, mere knowledge that the victim was a law enforcement officer, and the mere wearing of the uniform, are not enough to transform the assault into an assault on a law enforcement officer. Under the plain language of the statute, the officer must be "acting within the scope of his duty, office or employment." Justice King also found error, albeit harmless, in allowing the testimony of the jail nurse in rebuttal to Bates's claim that he burned his arm when this gun accidentally went off. There was no evidence the nurse was on duty when Bates was booked, was familiar with the form used, or had any personal knowledge of Bates's treatment. "The State simply evaded the rules of evidence by using an employee with no personal knowledge of the form and no personal knowledge of Bates to essentially read the form into the record. This was improper, and Williams's testimony was improperly admitted."

To read the full opinion, click here:
http://courts.ms.gov/Images/Opinions/CO105299.pdf

Jairus Collins v. State, No. 2013-CT-00761-SCT (Miss. August 20, 2015)

CASE: Murder
SENTENCE: Life

COURT: Forrest County Circuit Court
TRIAL JUDGE: Hon. Robert B. Helfrich

APPELLANT ATTORNEY: Michael Adelman
APPELLEE ATTORNEY: Melanie Dotson Thomas
DISTRICT ATTORNEY: Patricia A. Thomas Burchell

DISPOSITION: Reversed and Remanded. King, Justice, for the Court. Waller, C.J., Dickinson, P.J., Kitchens, Chandler, Pierce and Coleman, JJ., Concur. Randolph, P.J., Concurs with Part II and in Result Without Separate Written Opinion. Lamar, J., Concurs in Part and in Result Without Separate Written Opinion.

ISSUES: Whether the trial judge erred in failing suppress Jenkins's statements to police, and (2) whether the trial judge erred in allowing an officer to testify regarding cellular phone records without being qualified as an expert.

FACTS: On December 9, 2011, Ebony Jenkins's body was discovered behind a building in Hattiesburg. She had been shot twice. Police identified Jairus Collins as a suspect. A witness heard gunshots and looked out his window. He testified he saw a man of medium build and wearing a "hoodie-type sweater" that was "[e]ither blue or light gray or black," running from the area where the body was later found. Police found a gray sweater wrapped around the suspected murder weapon in a bag hidden in the woods. Jenkins's friend, Jessie Miles, testified he brought a gun to Collins to

repair for him in November of 2011. Miles identified as the gun found in the woods as the one he bought and gave to Collins to repair. Collins's brother, Joshia, testified that both he and Collins had been friends with Jenkins. He testified he lived near where the body was found, and Collins came to his apartment out of breath and wearing a gray hoodie on the night of Jenkins's murder. He witnessed Collins hiding a bag in the woods which he believed contained a weapon, and led police to the bag. The gun found fired the shell casing police found near Jenkins's body. Jenkins's phone records revealed that the last call she received came from a phone owned by Collins's father, which Collins confirmed he had possession of at the time. Collins initially told officers he did not know Jenkins very well and was working the night of December 7, 2011. However, he later admitted to giving her a ride that night. Collins and Jenkins exchanged several phone calls and text messages that night, and were both in the area where officers later found Jenkins's body. The COA affirmed Collin's conviction. ***Collins v. State***, No. 2013-KA-00761-COA (Miss.Ct.App. October 7, 2014).

HELD: (1) The trial judge erred in failing to suppress the statements. They were given after invocation of the right to counsel. The judge erred in determining Collins reinitiated contact with police after invoking his rights. Although Collins did speak to the officer, he first *reiterated* his invocation of his right to counsel. He told the officer he was going to tell the police everything, and that he didn't need a lawyer. In context, this was not a waiver of counsel, but a statement that he did not need a lawyer because he had done nothing wrong.

The State failed to adequately prove that Collins initiated conversation with police. In fact, the MSSCT commented that the State "completely misrepresented Collins's statement" in its brief to the COA. Even if Collins did "initiate" the conversation, the State failed to prove the statement was knowing and intelligent. The detective actively interrogated Collins, rather than merely listening to him. He was not re-read his rights. The detective also told Collins that the police could not do anything to help him "because you said you wanted your lawyer," appearing to use Collins's invocation of his right to counsel against him, to pressure him into a statement.

(2) The MSSCT acknowledged that whether testimony regarding cell phone location technology is expert or lay testimony is an issue of first impression in Mississippi. Detective Casey Sims testified regarding the cell phone towers that Collins's and Jenkins's cell phones used to make and receive phone calls and to send and receive text messages around the time of Jenkins's death. He also produced and explained a map that depicted the areas in which he opined Jenkins and Collins must have been at certain times, with highlighting of those areas. .

Testimony that simply describes the information in a cell phone record is properly lay testimony. Testimony that merely informs the jury as to the location of cell phone towers may properly be lay testimony when it is based upon the personal observations of the witness. But testimony that goes beyond the simple descriptions of cell phone basics, specifically testimony that purports to pinpoint the general area in which the cell phone user was located based on historical cellular data, requires scientific, technical, or other specialized knowledge that requires expert testimony.

Not only did Detective Sims testify regarding the general locations of Collins's and Jenkins's cell phones, he went even further and opined as to Jenkins's exact location based on the cell phone records, stating on the map that "Ebony is traveling west on 4th Street." This testimony was clearly not based upon Detective Sims's own perceptions. "To utilize such testimony, the State was required

to qualify Detective Sims as an expert, and consequently, Collins was entitled to pretrial disclosures regarding expert witnesses. Additionally, Detective Sims, as a police officer, held the public trust, and his giving expert testimony without being qualified as such was particularly harmful to Collins."

To read the full opinion, click here:
http://courts.ms.gov/Images/Opinions/CO105225.pdf

August 27, 2015

Charles Ray Crawford v. State, No. 2014-KA-00175-SCT (Miss. August 27, 2015)

CASE: Rape
SENTENCE: 46 years

COURT: Tippah County Circuit Court
TRIAL JUDGE: Hon. R. Kenneth Coleman
TRIAL COURT ATTORNEYS: David O. Bell, James W. Pannell

APPELLANT ATTORNEY: Charles Ray Crawford (Pro Se), Glenn S. Swartzfager
APPELLEE ATTORNEY: Stephanie Breland Wood
DISTRICT ATTORNEY: Benjamin F. Creekmore

DISPOSITION: Affirmed. Pierce, Justice, for the Court. Waller, C.J., Randolph, P.J., Lamar and Chandler, JJ., Concur. Dickinson, P.J., Dissents with Separate Written Opinion Joined by Kitchens and King, JJ. Kitchens, J., Dissents with Separate Written Opinion Joined by King, J.; Dickinson, P.J., Joins in Part. Coleman, J., Dissents with Separate Written Opinion Joined by Dickinson, P.J., Kitchens and King, JJ.

ISSUES: (1) Whether the 21-year delay in this appeal violates crawford's due-process rights under the Mississippi and United States constitutions, (2) whether Crawford was denied his right to counsel and due process when he was constructively left without counsel during a critical stage of the proceedings against him, (3) whether the trial court committed reversible error when, over objection, it gave a jury instruction that improperly shifted the burden of proof, (4) whether Crawford's constitutional rights were violated by a search of his home by law-enforcement officials without a warrant.

FACTS: On April 13, 1991, seventeen-year-old Sue was riding around Walnut, MS, with her friend Nicole. They saw Charles Ray Crawford and asked if he would help them put fluid in their car. Sue was Janet Robert's sister, Crawford's first ex-wife. While later putting fluid in the car, Crawford told Sue that he needed to talk to her about something. Crawford told her they needed to get out of Walnut to talk because his second ex-wife Gail might find out he was talking to her and stop him from seeing his son. Crawford eventually took them to his house. At his house, he pulled a gun and put it to Sue's head. (Nicole waited in the car). He then taped Sue's hands and mouth and raped her. Apparently hearing a noise he went outside and hit Nicole with a hammer. Crawford kept saying, "What have I done? Janet is going to hate me," and at one point gave the gun to Sue and asked her to kill him. He and Sue drove to Memphis. Meanwhile, after Nicole told police Sue needed help at

Crawford's house. They entered the house and found several pieces of evidence. After speaking with Janet and another friend, Crawford finally turned himself in to police. Crawford was indicted for kidnapping and rape against Sue, and separately indicted for the aggravated assault of Nicole. Prior to both trials, Crawford indicated that he planned to pursue an insanity defense. Crawford was thereafter evaluated and examined by multiple mental-health professionals.

On January 30, 1993, three days before his aggravated-assault trial, Crawford was arrested for the capital murder of Kristy D. Ray. Since his attorney had been involved in reporting that Crawford may be planning another crime, he moved to withdraw representing him in the rape and assault cases. The trial court stayed the motion and continued all other motions in the scheduled aggravated-assault trial until another psychiatric examination of Crawford was conducted. He was found competent. Crawford was convicted of aggravated assault and sentenced to 20 years. This was affirmed on appeal. ***Crawford v. State***, 787 So. 2d 1236, 1238 (Miss. 2001). He later testified at his rape trial that he had no memory of the incident. He was convicted of rape, but acquitted of kidnapping. Crawford's trial counsel did not file any post-trial motions in his rape case, nor did he file a notice of appeal. Crawford was subsequently convicted of captial murder and sentenced to death. ***Crawford v. State***, 716 So. 2d 1028 (Miss. 1998). Sometime after his capital murder conviction, Crawford inquired about his other appeals. He was appointed counsel for the rape case in 1996. A notice of appeal was filed in 1998, but no appeal was ever docketed. In 2002, another attorney was appointed, but nothing was ever filed. Finally, in 2014, a third attorney was appointed and the appeal was filed.

HELD: (1) Crawford first contends that the 21-year delay for his appeal denied him due process of law. However, since the Court found no reversible error in the trial, reversal on the grounds of a denial of a speedy appeal is inappropriate.

(2) This issue was raised in Crawford's death penalty federal habeas case and rejected. Although Crawford's February 2, 1993, competency evaluation was conducted in violation of Crawford's 6th Amendment right to counsel, the error was harmless. Crawford's first attorney had consented to the evaluation after filing a motion to withdraw from the case. Crawford was without counsel at the time of his February 2, 1993 evaluation. However, he had been previously evaluated for his aggravated assault case. Because Crawford was required to undergo a psychiatric examination without counsel, his 6th Amendment rights were violated with respect to the capital-murder charge. The State presented sufficient evidence to the jury to uphold Crawford's capital-murder conviction without the need for the February 2nd evaluation.

Further, the clinical opinions reached as a result of the February 2nd evaluation were substantially the same as those reported in the December 1992 evaluations. There was more than sufficient evidence apart from the results of the February 2nd evaluation, upon which the jury could base its verdict that Crawford was guilty of rape. Crawford was aware of this evidence, and he chose to pursue his insanity defense, knowing the evidence would be introduced. "We are more than satisfied that the February 2 evaluation, standing alone, did not contribute to the verdict." This was not an actual conflict of interest involving multiple clients where prejudice is presumed. This was a personal conflict between Crawford and his first trial attorney. It did not prejudice Crawford.

(3) Crawford next argues that the insanity instruction given in S-8 improperly shifted the burden of proof away from the State. While the instruction mirrors language the Court has used to describe the

M'Naghten test, the instruction, standing alone, could be confusing on the question of who bears the burden of proof on the issue of insanity. The instruction also fails to inform the jury that all that is required of an accused is to present sufficient evidence creating a reasonable doubt as to his sanity at the time of the act. However, the jury was properly instructed in S-4 that the State bears the burden to prove sanity beyond a reasonable doubt. When read together, the jury was adequately instructed.

(4) The trial judge did not err in failing to suppress the evidence gathered in Crawford's house without a warrant. The search was legal as an emergency search under exigent circumstances. Based upon information Nicole provided, the deputies reasonably believed Sue's life and safety were in danger, and their primary motivation for the search was to locate Sue. Officers were allowed to return to the house after the initial search because the items seized were in plain view during the emergency search. Officers explained they were short-handed and others were still looking for Sue. They did not have time to secure the house while a warrant was obtained. The delay between the plain-view observation and seizure of the evidence was short.

Dickinson, Presiding Justice, Dissenting:

Justice Dickinson dissented, arguing it was error to improperly instruct on insanity. Through his own testimony, and that of his mother and ex-wife, Crawford presented compelling evidence that he was legally insane. The State presented evidence to the contrary in rebuttal, setting up an important dispute of fact for the jury to resolve. However, the jury was improperly instructed on the insanity defense. The instruction used clearly and improperly shifted the burden to Crawford. S-4 and S-8 were clearly conflicting.

Kitchens, Justice, Dissenting:

Agreeing with Justice Dickinson on the insanity instruction, Justice Kitchens wrote separately to argue the evidence seized by police should have been suppressed. An officer testified he did not see any evidence that Sue had been there or that a crime had been committed. The officer claimed he obtained permission from Crawford's grandfather for the second search. The consent exception to a warrantless search does not apply here. "The record is devoid of proof that the sheriff's deputies had any reasonable basis to believe that the grandfather possessed any authority whatsoever to consent to the officers' second entry into Crawford's residence."

At the time the deputies first had entered Crawford's home they had good reason to believe that Sue was inside. However, the second time they did not. An exigency no longer existed with regard to Crawford's home, as officers had abandoned the search of Crawford's house in order to look elsewhere. There was no indication that evidence would be lost, destroyed, or removed during the time required to obtain a search warrant. The U.S. Supreme Court never has allowed police to extend their entry into a dwelling based on the exigency exception to reenter a dwelling for the purpose of conducting a plain-view search.

Justice Kitchens also believed a hearing should have been held on Crawford's claim that he was not given a speedy appeal. Given the other errors in this case, it is appropriate to consider the merits of Crawford's speedy appeal claim.

Coleman, Justice, Dissenting:

Justice Coleman believed there was an actual conflict of interest in the case, and that prejudice must be presumed. When an attorney continues to represent a criminal defendant despite the existence of an actual conflict of interest, such continued representation constitutes per se ineffective assistance of counsel and mandates reversal. Counsel filed the motion to withdraw on February 1, 1993. The trial court did not grant the motion to withdraw until February 4, 1993. However, counsel appeared on Crawford's behalf at a competency hearing after he filed the motion to withdraw. Counsel agreed to join the motion for a mental examination at Whitfield. He continued to represent Crawford while having an actual conflict of interest. "We should hold that Crawford *per se* received ineffective assistance of counsel, and we should reverse and remand."

To read the full opinion, click here:
http://courts.ms.gov/Images/Opinions/CO104745.pdf

September 3, 2015

Reginald Jackson v. State, No. 2013-KA-02040-SCT (Miss. September 3, 2015)

CASE: Armed Robbery
SENTENCE: 30 years, with 5 suspended, and 5 years PRS

COURT: Hinds County Circuit Court
TRIAL JUDGE: Hon. Jeff Weill, Sr.
TRIAL COURT ATTORNEYS: Brad Marshall Hutto, Gale Nelson Walker

APPELLANT ATTORNEY: David Neil Mccarty
APPELLEE ATTORNEY: LaDonna C. Holland
DISTRICT ATTORNEY: Robert Shuler Smith

DISPOSITION: Affirmed. King, Justice, for the Court. Waller, C.J., Dickinson and Randolph, P.JJ., Kitchens, Chandler, Pierce and Coleman, JJ., Concur. Lamar, J., Concurs in Part and in Result Without Separate Written Opinion.

ISSUES: (1) Whether Jackson's right to a fair trial was violated by the prosecutors' comments, and (2) whether the State failed to prove that a deadly weapon was used in commission of the robbery.

FACTS: On December 9, 2011, Roger McDowell and Oliver Robinson, two JSU students, were leaving the cafeteria on campus. McDowell and Robinson passed Reginald Jackson and Derrick Course, who asked them what the cafeteria was serving. Both Robinson and McDowell testified that Course then pulled out a knife and demanded McDowell's iPhone. Robinson and McDowell ran away in opposite directions. McDowell slipped and Jackson "started to beat up on" him. Course, who was still in possession of the knife, started back toward McDowell and Jackson. McDowell gave up his phone, fearing he would be stabbed. Jackson and Course then ran into a dorm, and entered Arron Richardson's room. Richardson stated that Course and Jackson told him to stay in the room because someone was looking for them. Richardson testified at trial that he saw Jackson give Course a phone

and some money. After an hour or so, Course allowed Richardson to leave in order to get his truck to help get them off campus. Instead, he found a police officer and Course and Jackson were arrested. Two cell phones, a pocket knife, and some money were found on Course. Jackson and Course were tried separately. Jackson was convicted and he appealed.

HELD: (1) During opening statements, the prosecutor repeatedly mistakenly alleged the robbery was committed with a gun. Although he corrected himself, this happened four times, but with no defense objections. In closing argument, another prosecutor argued to the jury that "Roger, Oliver and Arron have done everything they can to convict this guy of armed robbery. Today they're asking you 12, and only you 12, to finish this, to find him guilty of armed robbery." Jackson alleges this was an impermissible "send a message" argument. The prosecutor also stated they caught Jackson "red-handed," but no evidence was found on him.

"Given the evidence of guilt, this Court finds that the prosecution's repeated misstatements of evidence and improper arguments, in the absence of an objection, did not rise to the level of reversible error in this case."

> While we do not find reversible error under the facts of this specific case, prosecutors are now put on notice that such improper conduct is error. Because the State has now been warned, similar conduct by the prosecution is more likely to result in reversible error.

(2) Jackson claimed the State failed to prove the three inch pocket knife used in this case was a deadly weapon. "Because it is well-established that the jury determines whether an item is actually a deadly weapon and because the jury was properly instructed on the issue, Jackson's contention that the State failed in its burden to prove the knife was a deadly weapon has no merit."

To read the full opinion, click here:
http://courts.ms.gov/Images/Opinions/CO106750.pdf

September 17, 2015

Brian Holliman v. State, No. 2013-KA-02121-SCT (Miss. September 17, 2015)

CASE: First Degree Murder
SENTENCE: Life

COURT: Lowndes County Circuit Court
TRIAL JUDGE: Hon. Lee J. Howard
TRIAL ATTORNEYS: Forest Allgood, Katie Moulds, Steve Farese, Whit Cooper

APPELLANT ATTORNEY: Steven E. Farese, Sr., Joseph Whitten Cooper
APPELLEE ATTORNEY: LaDonna C. Holland
DISTRICT ATTORNEY: Forrest Allgood

DISPOSITION: Affirmed. Chandler, Justice, for the Court. Waller, C.J., Dickinson and Randolph,

P.JJ., Lamar, Kitchens, Pierce, King and Coleman, JJ., Concur.

ISSUES: (1) Whether the evidence of deliberate design was insufficient to support the verdict, (2) whether the jury instructions were improper, (3) whether the trial court erroneously admitted hearsay statements made by the victim, (4) whether the trial court erroneously denied a motion to suppress his two written statements, and (5) whether the trial court erred by denying his motion to quash the indictment.

FACTS: On October 25, 2008, Laura Holliman died in her home from a single shotgun wound to the left side of her face. Her husband, Brain Holliman, told police that he had been outside with the couple's children when he heard a gun shot, went inside, and discovered Laura had committed suicide. After an autopsy, the pathologist told police this appeared to be a homicide. Brian was interviewed again by police. This time he told them Laura's death was accident. Brian explained that he had picked up the gun in an effort to prevent Laura from committing suicide. When she grabbed the barrel, the gun went off. Brian then admitted to placing the gun near Laura's body to make her death appear to be a suicide. Brian later provided a third statement where he admitted to deliberately pointing the gun at Laura to scare her, but she hit the gun and it went off. Several witnesses testified concerning the Hollimans rocky marriage, and Laura had just asked Brian for a divorce. Holliman's first conviction for murder was reversed on appeal based on an improper golden rule argument by the prosecutor. ***Holliman v. State***, 79 So. 3d 496 (Miss. 2011). At his retrial, Holliman was again convicted and appealed.

HELD: (1) There was sufficient evidence for the jury to find first degree (deliberate design) murder. The State presented "copious evidence" that Holliman had harbored deliberate design to kill when he shot Laura. They were not engaged in friendly horseplay when the shooting occurred. Laura had just asked Brian for a divorce that morning, and Holliman was angry. He was seen angrily yelling at her earlier at a football game. Holliman told a friend of Laura's that he would not agree to a divorce. He admitted that he was upset when he pointed the gun at Laura. He immediately moved her body and staged a suicide. A reasonable jury could find the killing was intentional and not an accident.

(2) The malice aforethought instruction was proper. First, the instruction was not objected to, so the claim is barred. Regardless, the claim is without merit. Although the instruction told the jury if malice existed "but for an instance before" the killing, it also clearly stated that "[m]alice aforethought cannot be formed at the very moment of the fatal act."

The second degree (depraved heart) murder instruction was also proper. Again, this claim is also barred for failing to object at trial. It is also without merit. The instruction did not tell the jury to presume any element of depraved-heart murder based on the use of a deadly weapon. The instruction properly followed the statute and outlined the dangerous act Holliman was alleged to have engaged in as pointing a loaded weapon with the safety off at the victim.

The State's closing argument did not shift the burden of proof to him by the prosecutor's statement that "people intend the natural consequences of their act." Once again, the claim is barred for failing to object. The prosecutor's statements did not ask the jury to *presume* deliberate design from Holliman's use of a deadly weapon. Rather, what the prosecutor said amounted to an argument that

the jury could *infer* Holliman's intent to kill from his use of a deadly weapon and the other evidence.

The trial court did not err in denying a circumstantial evidence instruction. Holliman's admission that he shot Laura was an admission to the "killing of a human being" element of the charged crime of first-degree murder. Holliman's admission to shooting Laura constituted direct evidence.

(3) Holliman argued that the trial court erroneously allowed several hearsay statements Laura made to others before her death. Laura's sister, Katie, testified that after a fight with Holliman, Laura told her she was leaving him. Laura's friend, Lee Ann Tucker, testified that Laura had talked to her about wanting a divorce, and that Laura had told her that Holliman had locked her in the closet during a fight, and that then she went to the emergency room because she had a migraine. Another friend, Angela Jones, testified that Laura called her at 3:56 p.m., five minutes before Holliman called 911 to report the shooting. Laura said that she was in her closet, and that "Brian was being a butt."

The statement to Katie was admissible under MRE 803(3), as evidence of Laura's existing state of mind and intent. Likewise, Laura's statement to Tucker that she wanted a divorce described her state of mind and intent at the time she made the statement. Laura's statements to Tucker about being locked in the closet by Brian had sufficient guarantees of trustworthiness to be admissible under MRE 804(b)(5). The statement regarding the ER visit is more "problematic," but any error in the admission of this statement did not prejudice Holliman. Finally, Laura's statments to Jones were admissible as a present sense impression and an excited utterance. M.R.E. 803(1) and MRE 803(2).

(4) The trial judge did not err in failing to suppress Brian's first two statements to police. He was not in custody at the time of the two interviews. *Miranda* warnings were not required. It does not matter that Holliman was a "person of interest." First, the issue was not procedurally barred. Holliman's objection to the statements during his first trial was sufficient to preserve the issue in the second trial when the court adopted all of its previous rulings from the first case.

Holliman also argued his third statement should be suppressed because of the investigator's misbehavior in another, unrelated case. Holliman did challenge this statement at trial, so it is barred.

(5) The trial court did not err in failing to quash the indictment because some of the language was blacked-out by the prosecutor. The black-out was not initialed or dated. Holliman argued that the changes were improperly made after the grand jury foreman signed the document. However, the trial court observed that the indictment correctly charged Holliman with the crime of murder and found the blacked-out language to be surplusage. Because an indictment can be amended to strike surplusage, it is irrelevant whether or not the blackout occurred after the foreman signed the indictment.

To read the full opinion, click here:
http://courts.ms.gov/Images/Opinions/CO107118.pdf

Michael Deark Gardner v. State, No. 2014-KA-01482-SCT (Miss. September 17, 2015)

CASE: Possession of more than 30 grams but less than one kilo of Marijuana with Intent
SENTENCE: 10 years, day for day, as an habitual and second offender

COURT: Harrison County Circuit Court
TRIAL JUDGE: Hon. Michael H. Ward
TRIAL ATTORNEYS: W. Crosby Parker, Shundral Cole

APPELLANT ATTORNEY: Lisa D. Collums, Angela B. Blackwell
APPELLEE ATTORNEY: Billy L. Gore
DISTRICT ATTORNEY: Joel Smith

DISPOSITION: Affirmed. Lamar, Justice, for the Court. Waller, C.J., Dickinson and Randolph, P.JJ., Chandler, Pierce and Coleman, JJ., Concur. Kitchens, J., Dissents with Separate Written Opinion Joined by King, J.

ISSUE: Whether Gardner's sentence must be vacated since a penalty no longer exists in the Code for his criminal offense.

FACTS: Michael Gardner was tried and convicted of possession of more than thirty grams but less than one kilogram of marijuana, with intent to distribute. After he was sentenced, Gardner filed a JNOV, and a motion to vacate his sentence, arguing that his "alleged crime and its corresponding sentence [were] no longer codified," and that "any enhancement pursuant to § 41-29-147 [was] improper as there is no longer a sentence provided at law by § 41-29-139 for [his] indicted offense, and therefore, no sentence to enhance." After a hearing, the trial judge denied his motions. Gardner appealed.

HELD: Gardner was convicted under §41-29-139(a)(1). HB 585 amended several section of the Mississippi Code. However, the statute used to convict Gardner was unchanged, so his conviction was valid. However, the penalties for a violation of this crime did change. Prior to the amendments, a subsequent drug offender could have been sentenced to up to 30 years. A first-time offender could have been sentenced to up to 20 years. After the amendments, there was no penalty listed for a subsequent offender. The code (§41-29-139(b)(2)) only provides for a penalty for first-time offenders of 5 years.

Regardless, his sentence should not be vacated. The enhancement statute—which was left unchanged by the amendments—provides that a subsequent offender may be imprisoned for up to twice what is "otherwise authorized." And what is "otherwise authorized" refers to what Gardner would have received for the amount of drugs at issue here if he was a first-time offender; which is up to five years. Accordingly, a 10 year sentence was proper.

Kitchens, Justice, Dissenting:

Justice Kitchens dissented, arguing §41-29-139(a)(2) could not apply to Gardner since he was not a first-time offender. "The State, in essence, is attempting to take a statutory penalty which applies only to first-time offenders and multiply it by two, because Gardner was a subsequent offender." For Gardner to be sentenced properly, the Court must apply a sentencing statute under whichever element applies to the relevant criminal behavior. In this case, the crime is the lesser-included charge of simple possession under §41-29-139(c). The maximum imprisonment is 3 years. As a subsequent offender, the maximum time Gardner can be sentenced to is 6 years.

To read the full opinion, click here:
http://courts.ms.gov/Images/Opinions/CO106221.pdf

October 1, 2015

Anthony Windless v. State, No. 2014-KA-00547-SCT (Miss. October 1, 2015)

CASE: Capital Murder
SENTENCE: Life w/o parole

COURT: Quitman County Circuit Court
TRIAL JUDGE: Hon. Charles E. Webster
TRIAL COURT ATTORNEYS: Brenda F. Mitchell, Wilbert Levon Johnson

APPELLANT ATTORNEY: Mollie M. Mcmillin
APPELLEE ATTORNEY: Jeffrey A. Klingfuss
DISTRICT ATTORNEY: Brenda F. Mitchell

DISPOSITION: Affirmed. Waller, Chief Justice, for the Court. Randolph, P.J., Lamar and Pierce, JJ., Concur. Chandler, J., Concurs in Part and in Result with Separate Written Opinion. Dickinson, P.J., Dissents with Separate Written Opinion Joined by Kitchens and King, JJ. Coleman, J., Dissents with Separate Written Opinion Joined by Dickinson, P.J.

ISSUES: (1) Whether the trial court erred in failing to instruct the jury on the elements of larceny when burglary with the intent to commit a larceny, was the underlying offense to capital murder, and (2) whether Windless received ineffective assistance of counsel.

FACTS: Anthony Windless was convicted of the February 2011 capital murder of Charles Presley. Presley was found beaten to death in his home by family members. Investigators found a broken window on the back side of Presley's home. The back door to the home was also ajar. Police developed Windless as a suspect based on his involvement in a prior similar crime and the fact that he lived near Presley. A jacket Windless wore the day before had Presley's blood on it. A bloody flashlight, a CD player, and a ski mask also were found in a garbage can outside of Windless's cousin's home, about a block away from Presley's home. The blood on the flashlight was matched to Presley, as well. Windless's fingerprints were found throughout the crime scene. Windless initially denied involvement, but after agreeing to take a polygraph test, Windless later confessed. Windless broke into Presley's home and was ransacking the place looking for valuable items when Presley returned home. Windless grabbed a large flashlight and hid behind the front door. As Presley entered the front door, Windless struck him on the head with the flashlight. Windless struck Presley a total of 23 times with the flashlight, ultimately killing him. Windless then took cash, as well as some jewelry, a CD player, and the flashlight, and fled the scene. The flashlight found at Windless's cousin's home was identified as the murder weapon. The jury was instructed on the essential elements of both the principal offense of capital murder and the underlying felony of burglary, with the intent to commit a larceny. While the jury was instructed on burglary, no separate instruction was provided to the jury on the elements of larceny. Windless appealed.

HELD: (1) The elements of burglary are (1) "breaking and entering the dwelling house or inner door of such dwelling house of another" (2) "with the intent to commit some crime therein[,]" and the jury was instructed as such. The elements of the crime which the defendant intended to commit are not elements of burglary. Therefore, the State is not required to prove each element of the intended crime (larceny here) with the same particularity as is required when a defendant is charged only with the crime intended. The intent to commit some crime, be it a felony or a misdemeanor, is simply an element of the crime of burglary.

The plurality when on to argue that ***Conner v. State***, 138 So. 3d 143 (Miss. 2014), was incorrectly decided, in as far as the review should have been under the plain error doctrine. In ***Conner***, the Court held that trial courts should instruct the jury on the elements of the intended crime in a burglary trial. The Court recognized that the general lay understanding of the term "larceny" is that it connotes stealing or theft. Since Conner did not object, his claim should have been barred. In this case, Windless waived his right to appeal this issue by failing to object at trial, so the claim can only be reviewed for plain error.

The failure to instruct on larceny does not require reversal. The elements of larceny are not elements of the crime with which Windless was charged. The failure to instruct on larceny did not result in a miscarriage of justice affecting Windless's fundamental rights. Larceny is commonly understood to connote stealing or theft. The State submitted sufficient evidence for the jury to find that Windless feloniously broke into and entered the victim's house with the intent to steal.

(2) Windless alleged his attorney failed to present an opening statement, failed to object to the State's jury instructions, elicited prejudicial testimony concerning his polygraph examination, and elicited prejudicial testimony concerning his criminal record. "We find that these claims would be more appropriately presented in a petition for post-conviction relief. Accordingly, we dismiss Windless's ineffective-assistance claim without prejudice."

Chandler, Justice, Concurring in Part and in Result:

Justice Chandler agreed with the plurality's holding that the jury was properly instructed in this case, but disagreed with the plurality's conclusion that the Court erred in ***Conner*** by failing to procedurally bar this issue and reviewing it under the plan error doctrine. For a burglary conviction, the State need only show that the defendant intended to commit the specified crime, and it need not prove the essential elements of that intended crime. However, with no understanding of the acts comprising the intended crime, a jury cannot accurately determine whether the defendant harbored the requisite intent. Thus, the jury's comprehension of the intended crime is essential to its ability to determine whether the defendant committed burglary. Trial courts have a duty to properly instruct the jury concerning the intended crime in a burglary case.

Dickinson, Presiding Justice, Dissenting:

Justice Dickinson dissenting, arguing that there was no way the jury properly could have found beyond a reasonable doubt that Windless intended to commit a larceny without knowing the elements of larceny. "To assume, as does the plurality, that the jury understood the term 'larceny' with no

instruction from the trial court is, in my view, indefensible." A claim on the failure to instruct on the elements of a crime should not be procedurally barred.

Coleman, Justice, Dissenting:

Justice Coleman dissented, explaining that the ***Conner*** Court's holding that larceny is commonly understood to connote stealing or theft, is not applicable in this case, as the jury was not instructed, as in ***Conner***, that an inference of the intent to steal may arise from proof of the breaking and entering. Without the inference instruction, the ***Conner*** Court apparently would have reached a different result. It was not the jury instruction on burglary alone that the ***Conner*** Court held to be sufficient, but the burglary instruction plus the inference instruction. Since no such inference instruction was given in Windless, his conviction should be reversed.

To read the full opinion, click here:
http://courts.ms.gov/Images/Opinions/CO107860.pdf

SCT POST-CONVICTION CASES:

Patrick Fluker v. State, No. 2013-CT-00608-SCT (Miss. June 11, 2015)
[COA opinion from June 17, 2014 affirmed]

CASE: PCR – Robbery
SENTENCE: 15 years, with 3 to serve, 12 suspended, and 4 years PRS

COURT: Forrest County Circuit Court
TRIAL JUDGE: Hon. Robert B. Helfrich

APPELLANT ATTORNEY: Patrick Fluker (Pro Se)
APPELLEE ATTORNEY: Elliott George Flaggs

DISPOSITION: Dismissal of PCR Affirmed. Chandler, Justice, for the Court. Waller, C.J., Randolph, P.J., Pierce and Coleman, JJ., Concur. Kitchens, J., Dissents with Separate Written Opinion Joined by Dickinson, P.J., and King, J. Lamar, J., Not Participating.

ISSUES: (1) Whether the COA erred in finding the PCR was excepted from the successive writ bar, but that the motion was barred under the doctrine of *res judicata,* (2) whether his PCR was excepted from the procedural bar based on a violation of his fundamental rights, and (3) whether the COA erred by finding the PCR time barred.

FACTS: Patrick Fluker was indicted for armed robbery, but pled guilty to one count of robbery. Fluker was incarcerated until 2005. He was then placed on earned-release supervision (ERS), receiving his discharge certificate on April 18, 2005, and being officially released from MDOC custody on April 23, 2005. He then began his PRS. He was arrested again on May 5, 2005. He was charged with armed robbery and felon in possession of a weapon. On June 23, 2005, the trial court found that he had violated the terms of his PRS, and his suspended sentence was revoked. The trial court ordered him to serve the remaining 12 years of his sentence. On January 10, 2007, Fluker filed

a PCR, alleging that the trial court lacked the authority to impose his original sentence, because it exceeded the maximum sentence authorized for robbery. He was denied relief, which was affirmed on appeal. ***Fluker v. State***, 2 So. 3d 717 (Miss. Ct. App. 2008). On July 25, 2012, Fluker filed another PCR. The trial summarily dismissed the motion. The COA affirmed the dismissal, holding that Flucker was not on ERS, but PRS when revoked, and that his PCR was procedurally barred. ***Fluker v. State***, No. 2013-CP-00608-COA (Miss.Ct.App. June 17, 2014). The SCT granted certiorari.

HELD: (1) The COA correctly found that Fluker's PCR was procedurally barred, but it erred in its analysis of the procedural bars. The COA found the PCR barred by the doctrine of *res judicata*. However, *res judicata* does not apply to post-conviction claims of constitutional dimensions. The issue is properly resolved by applying the statutory successive pleadings bar (§99-39-23(6)), not *res judicata*.

(2) Fluker's claim that the circuit court lacked jurisdiction to revoke his PRS because he was on ERS is belied by the record. Therefore, Fluker has not made a showing sufficient to implicate the fundamental-rights exception to the successive-pleadings bar.

(3) The COA also erred in its analysis of the limitations period applicable to Fluker's second PCR. The COA correctly found that, because Fluker claimed that his conditional release had been unlawfully revoked, his PCR was excepted from the time bar. However, the court went on to state that §99-39-5(2) does not allow an unlimited period of time for Fluker to file after an illegal revocation. It incorrectly found the general statute of limitations in §15-1-49 to apply. In enacting the post-conviction act, the legislature crafted exceptions to the three-year limitations period for certain claims. Due to the exclusivity of the act for PCRs, these exceptions cannot be defeated by the general, three-year statute of limitations.

Kitchens, Justice, Dissenting:

Justice Kitchens dissented for two reasons.

> First, I do not agree that Fluker's claims before this Court are barred by either the statutory successive pleadings bar or common law *res judicata*. Second, this Court's approval of the summary dismissal of Fluker's due process claim is premature, because the record before us is silent with regard to the question of whether the revocation of Fluker's conditional release comported with federal and state due process requirements.

To read the full opinion, click here:
http://courts.ms.gov/Images/Opinions/CO103693.pdf

Richard Chapman v. State, No. 2012-CT-01574-SCT (Miss. July 2, 2015)

CASE: PCR – Rape
SENTENCE: Life

COURT: Hinds County Circuit Court
TRIAL JUDGE: Hon. Jeff Weill, Sr.

APPELLANT ATTORNEY: Richard Chapman, Pro Se
APPELLEE ATTORNEY: Jeffrey A. Klingfuss

DISPOSITION: Reversed and Remanded. Waller, Chief Justice, for the Court. Dickinson, P.J., Kitchens, Chandler and King, JJ., Concur. Randolph, P.J., Dissents with Separate Written Opinion Joined by Lamar and Pierce, JJ.; Coleman, J., Joins in Part. Coleman, J., Dissents with Separate Written Opinion Joined by Randolph, P.J., Lamar and Pierce, JJ.

ISSUE: Whether the trial court erred in denying Chapman an evidentiary hearing.

FACTS: In 1982, Richard Chapman was convicted by a jury of rape and was sentenced to life imprisonment. That same year Chapman also pled guilty to robbery and was sentenced to ten years. Chapman, who was 16 at the time, did not directly appeal the rape conviction. Over the years, Chapman has filed numerous unsuccessful motions Hinds County and in the Mississippi Supreme Court. His trial record was allegedly destroyed. The various motions were all denied on procedural grounds. On April 19, 2012, Chapman filed another PCR in the trial court. The trial court found Chapman's motion to be time-barred and denied relief. On appeal, the COA found his PCR time-barred. *Chapman v. State*, No. 2012-CP-01574-COA (Miss.Ct.App. June 10, 2014). The SCT granted certiorari.

HELD: The trial court erred in ruling Chapman's current PCR was procedurally barred. Chapman raised credible allegations affecting fundamental constitutional rights, which are excepted from the PCR statutory bars. "Under these peculiar circumstances, we find that, in the interests of justice, Chapman is entitled to an evidentiary hearing so that he and the State have an opportunity to reconstruct his trial record."

The trial court also should strongly consider appointing counsel to represent Chapman for this evidentiary hearing if he qualifies as indigent. At the evidentiary hearing, the trial court should determine if the trial record and transcript exist, and if not, whether an adequate equivalent can be reconstructed. If that is not possible, Chapman should get a new trial.

Randolph, Presiding Justice, Dissenting:

Justice Randolph dissented. Chapman filed his first PCR almost 25 years after his conviction. Chapman did not raise any claims of double jeopardy, illegal sentence, or denial of due process in sentencing. Therefore, he argued that Chapman's PCR was time-barred and successive writ barred because his motion has been ruled upon and denied by at least seven other courts.

Coleman, Justice, Dissenting:

Justice Coleman also dissented and would also affirm the COA opinion. He pointed out that the transcript of Chapman's trial likely never existed because there was no appeal, and the trial proceedings would not have been transcribed unless Chapman had appealed. Other than the routine

destruction of the physical evidence, there is no proof that anything else was destroyed. "Chapman has shown no prejudice from the alleged loss or non-existence of any portion of his thirty-plus-year-old trial record." The bare allegation that Chapman does not have a record is not grounds for a new trial.

To read the full opinion, click here:
http://courts.ms.gov/Images/Opinions/CO101998.pdf

Timothy Lee Carr v. State, No. 2013-CT-01013-SCT (Miss. July 23, 2015)

CASE: PCR - Manslaughter
SENTENCE: 20 years as an habitual offender

COURT: Jones County Circuit Court
TRIAL JUDGE: Hon. Billy Joe Landrum

APPELLANT ATTORNEY: Timothy Carr (Pro se)
APPELLEE ATTORNEY: LaDonna C. Holland

DISPOSITION: Denial of PCR Affirmed. Lamar, Justice, for the Court. Waller, C.J., Randolph, P.J., Chandler, Pierce and Coleman, JJ., Concur. King, J., Dissents with Separate Written Opinion Joined by Dickinson, P.J., and Kitchens, J.

ISSUE: Whether the trial court erred by allowing the State to amend the indictment to allege habitual offender status without providing him sufficient notice under *Gowdy v. State*.

FACTS: Timothy Lee Carr was indicted and tried for capital murder, but was convicted of manslaughter in Jones County on May 25, 2005. His conviction was affirmed. ***Carr v. State***, 966 So. 2d 197 (Miss. Ct. App. 2007). Carr filed two PCRs. The SCT found both of Carr's motions barred as successive writs. On January 22, 2013, Carr filed another PCR seeking relief to eliminate the habitual-offender portion of his sentence. The SCT found that Carr's motion met the exception to the time-bar and allowed him to proceed in the trial court. The trial court denied Carr's PCR. On appeal, only the clerk's papers from his records were located. Additionally, sometime prior to 2008, the state moved for and the trial court granted a motion to destroy evidence and exhibits from Carr's trial. The COA found that it appeared Carr did not have sufficient notice the State would seek to sentence him as an habitual offender, a violation of ***Gowdy v. State***, 56 So. 3d 540 (Miss. 2010). However *Gowdy* was decided after Carr's case was final and was not retroactive. The COA affirmed the denial of relief. ***Carr v. State***, No. 2013-CP-01013-COA (Miss.Ct.App. April 29, 2014). The SCT granted certiorari.

HELD: The COA was affirmed. The rule in *Gowdy* does not apply retroactively to cases that were final before April 7, 2011, the date the mandate issued in *Gowdy*. The MSSCT has adopted the U.S. Supreme Court's retroactivity test, as outlined in *Teague v. Lane*, 489 U.S. 288 (1989). The principal in *Gowdy* was a new rule of procedure. New rules of procedure generally do not apply retroactively. It was not a "watershed" rule of criminal procedure which would require retroactivity.

King, Justice, Dissenting:

Justice King dissented, arguing that *Teague* did not apply, and that the majority ignored serious errors during Carr's sentencing. Nothing in the record indicated that the evidence of his prior convictions was actually introduced into evidence during the sentencing phase. This was insufficient for a proper bifurcated trial. The prior conviction exhibits to the motion to amend were later destroyed. *Teague* need not apply since the law in affect at the time of Carr's sentencing entitled him to relief. The trial court committed plan error in violating URCCCP Rule 7.09, by allowing the habitual offender amendment to Carr's indictment post-conviction and in a circumstance that gave Carr only mere minutes to mount a defense to the amendment. Finally, Carr's prior Georgia conviction for forgery was insufficient under the statute since it was a straight probationary sentence. He never served any time in prison on this offense. This was plain error.

To read the full opinion, click here:
http://courts.ms.gov/Images/Opinions/CO105782.pdf

SCT YOUTH COURT CASES:

RULE CHANGES

In Re: Mississippi Rules of Evidence, No. 89-R-99002-SCT (Miss. May 21, 2015). The SCT amended MRE 105 regarding the admission of evidence. The Comments were also deleted. Here is the change:

> ~~When evidence which is admissible as to one party or for one purpose but not admissible asto another party or for another purpose is admitted~~ If the court admits evidence that is admissible against a party or for a purpose—but not against another party or for another purpose— the court, unless expressly waived or rebutted, ~~upon request~~, shall restrict the evidence to its proper scope, ~~and~~ contemporaneously instruct the jury accordingly,~~.~~ and give a written instruction if requested.

MISCELLANEOUS CASES

Jeffery A. Stallworth v. State, No. 2013-CA-01643-SCT (Miss. April 16, 2015)

CASE: Civil - Expungement

COURT: Hinds County Circuit Court
TRIAL JUDGE: Hon. Jeff Weill, Sr.

APPELLANT ATTORNEY: John M. Colette, Sherwood Alexander Colette
APPELLEE ATTORNEY: Jeffrey A. Klingfuss

DISPOSITION: Reversed and Remanded. Dickinson, Presiding Justice, for the Court. Lamar, Kitchens, Chandler, King and Coleman, JJ., Concur. Randolph, P.J., Dissents with Separate Written Opinion Joined by Waller, C.J., Pierce, J., Joins this Opinion in Part. Pierce, J., Dissents with

Separate Written Opinion Joined by Waller, C.J., and Randolph, P.J.

ISSUE: Whether the trial judge erred in refusing to relieve petitioner of the duty to register as a sex offender after his original misdemeanor, fourth-degree, sexual-offense conviction from another state was expunged.

FACTS: In 2001, Jeffrey Stallworth was indicted in Maryland, for several sexual offenses. In March 2002, Stallworth pled guilty to one misdemeanor count of sexual offense in the fourth degree, for which he received a suspended sentence and probation. When Stallworth returned to Mississippi, he was required to register as a sex offender. His duty to register was affirmed in *Stallworth v. Mississippi Department of Public Safety*, 986 So. 2d 259 (Miss. 2008). On February 4, 2010, a Maryland district court expunged Stallworth's misdemeanor conviction. In December 2012, Stallworth petitioned the Hinds County Circuit Court for relief from the duty to register as a sex offender under §45-33-47. After filing his petition, counsel for Stallworth met in chambers with the Hinds County district attorney and the circuit judge. The district attorney conceded that Stallworth had no conviction requiring him to continue to register as a sex offender. Despite Stallworth's petition being unopposed, the trial judge denied the petition, so Stallworth appealed.

HELD: "At the moment Stallworth's Maryland conviction was expunged, the law provides that he was restored to the status he had occupied before he was convicted, which means that—in the eyes of the law—he had no conviction." Accordingly, he has no duty to register. In *Stallworth v. Mississippi Department of Public Safety*, the SCT found Stallworth had to register. However, after he obtained the expungement, that duty disappeared, and he was within his rights to petition the court for relief. The Court also found that §45-33-55 speaks to laws and orders affecting the maintenance of criminal history records. The statute says nothing about an order that expunges a conviction.

Randolph, Presiding Justice, Dissenting:

Justice Randolph believed the Court's original opinion in *Stallworth v. Mississippi Department of Public Safety* controls, and Stallworth's appeal is barred by *res judicata*.

Pierce, Justice, Dissenting:

Justice Pierce also dissented, citing §45-33-55, which states, aside from juvenile criminal history records, Mississippi's Sex Offender Registration Law does not except from the Act expunged records pertaining to sex offenses. "Whether Stallworth obtained an expunction order in Maryland is of no matter given Section 45-33-55. Stallworth must still comply with the registration requirements set forth under Mississippi's Sex Offender Registration Law."

To read the full opinion, click here:
http://courts.ms.gov/Images/Opinions/CO100814.pdf

In re: Office of the Hinds County Public Defender, No. 2015-M-00397 (Miss. May 21, 2015). En Banc Order signed by Dickinson, Presiding Justice for the Court. Coleman, J., Agrees in Result Only. Kitchens, J., Agrees in Part and Disagrees in Part with Separate Written Statement Joined in Part by King, J. Chandler, J., Agrees in Part and Disagrees in Part with Separate Written Statement Joined

in Part by Kitchens and King, JJ. King, J., Agrees in Part and Disagrees in Part with Separate Written Statement Joined by Kitchens, J.

BACKGROUND FACTS: Hinds County Circuit Judge Jeff Weill has been in an ongoing dispute with the Hinds County Public Defender's Office (HCPDO). In January, he decided to ban Assistant Public Defender Alison Kelly from his courtroom. He claimed she was incompetent, but gave no specific grounds for his actions. Since he could not be confident that Public Defender Michelle Purvis-Harris would not assign Kelly to his court, he later effectively banned the entire HCPDO and appointed private attorneys to handle indigent cases in his court. The HCPDO sought recusal of Judge Weill on all affected cases (roughly 55 separate cases). Judge Weill responded that he had the right to remove a public defender under §25-32-13(1) for "good cause."

HELD: Under §25-32-9, as soon as a defendant signs an affidavit that he/she is indigent and requests counsel, the public defender is appointed. Therefore, all indigent defendants appearing before Judge Weill are already represented by the public defender without the need to be appointed again. When a judge seeks to remove a public defender under §25-32-13(1), "we hold that the circuit judge shall, upon request of the defendant or by the public defender so removed, state on the record all facts and circumstances that support the removal of the public defender from the representation." The statute is not a substitute for the bar complaint process. Absent a finding through the bar complaint process that Kelly is incompetent to practice law, Judge Weill is without authority to deny Kelly the right to practice law before him, based on his belief that she generally is incompetent.

Judge Weill's allegations of inappropriate conduct do not justify the extreme sanction of excluding Kelly from representing indigent defendants in all future cases before him. Although the Court declined to recuse Judge Weill on all affected cases, the HCPDO can contact each client to determine if the client chooses to continue with the private counsel Judge Weill appointed, or to choose to have the HCPDO resume their representation.

> We urge all the parties before us—Judge Weill as a member of the judiciary; Purvis-Harris as a member of the Bar and as the Hinds County Public Defender; and Kelly, as a member of the Bar—to carefully examine the issues and to consider ways to ameliorate the problems that exist, so the judiciary may achieve the orderly administration of justice, the public may have confidence in the judicial process, and so that when Purvis-Harris appoints Kelly to represent an indigent defendant before Judge Weill, the defendant, the victims, and their families will not be deprived of fairness or justice due to personal issues between the parties that are unrelated to the case.

Kitchens, Justice, Agreeing in Part and Disagreeing in Part with Separate Written Statement:

Justice Kitchens believed the Court should order the recusal of Judge Weill from cases assigned to him in which Alison Kelly is an attorney of record, at least until the disciplinary matters they have filed against each other are resolved. He also would not have the HCPDO contact the affected clients. He believed the judiciary should do so.

Chandler, Justice, Agreeing in Part and Disagreeing in Part with Separate Written Statement:

Justice Chandler disagreed that the 55 cases affected should remain assigned by default to the private attorneys assigned by Judge Weill absent individual decisions by respective defendants to return to the HCPDO. He also belived that all of the exhibits in this case should be removed from under seal (with the exception of the respective complaints against Kelly and Judge Weill). "While I appreciate the idea of not wanting to release additional fodder for a public spectacle, lack of transparency creates the danger of inaccurate public inference and speculation."

King, Justice, Agreeing in Part and Disagreeing in Part with Separate Written Statement:

Justice King disagreed that the HCPDO should contact the clients affected. "In my view, the responsibility to ascertain the desires of these fifty-five defendants should be placed upon Judge Weill rather than the Public Defender's Office. That process of ascertaining which counsel the defendants wish to represent them should occur on the record and in open court." He also believed the Court should have ordered the recusal of Judge Weill in any of the 55 cases the HCPDO eventually handles, and should have ordered the documents filed in the case unsealed.

> Given this Court's finding of a fairly high level of animosity and vitriol between Judge Weill and Ms. Kelly, where Judge Weill's allegations of incompetency either appear to be or are determined to be without merit or shallow or trivial, Mississippi Rule of Appellate Procedure 48B would seem to require this Court to order the recusal of Judge Weill, rather than merely urging the parties to play nice.

To read the full Order, click here:
http://courts.ms.gov/Images/Opinions/198401.pdf

State of Mississippi, Ex Rel. Mississippi Bureau of Narcotics v. Bobby Ray Canada and Beverly Turman, No. 2014-CA-00592-SCT (Miss. June 4, 2015)

CASE: Civil - Asset Forfeiture

COURT: Quitman County Circuit Court
TRIAL JUDGE: Hon. Johnnie E. Walls, Jr.

APPELLANT ATTORNEY: Pelecia Everett Hall
APPELLEE ATTORNEY: Ja'nekia Wa'lexias Monique Barton, W. Ellis Pittman, Wilbert L. Johnson

DISPOSITION: Summary Judgment Affirmed. Coleman, Justice, for the Court. Waller, C.J., Dickinson, P.J., Lamar, Kitchens, Chandler, Pierce and King, JJ., Concur. Randolph, P.J., Not Participating.

ISSUES: (1) Whether the State failed to meet its duty to provide sufficient evidence in the appellate record, (2) whether the search warrant was valid and enforceable, and (3) whether the good faith exception applies.

FACTS: On August 15, 2013, MBN obtained a search warrant for the home of Beverly Turman. The warrant was signed by a justice court judge, but was completely blank under section one, denoting the location for the search to be executed. Agents searched the location and seized a revolver and ammunition, some documents, some storage bags, and $293,720 in cash. The State then filed a civil forfeiture action. The owners of the property, Bobby Ray Canada and Turman, filed an answer and a motion for summary judgment, alleging that the search warrant was void, and therefore, the search was illegal. The State then argued that the proceedings should be stayed because the affidavit and the underlying facts and circumstances sheet, listing the location of the search, were sealed by the State for other investigations, and they were needed to show the validity of the search warrant in the instant case. The State alleged that the judge had seen and signed the affidavit and the underlying facts and circumstances sheet when he signed the search warrant. The circuit judge denied the stay. At the motion for summary judgment, the State had the affidavit and the underlying facts and circumstances sheet unsealed for the trial judge's benefit. Nevertheless, the judge granted the motion for summary judgment. The State appealed.

HELD: (1) The State concedes that section one of the warrant was completely blank, but it claims that the warrant was valid and enforceable due to the doctrine of incorporation by reference of the affidavit and underlying facts and circumstances sheet. However, the State failed to provide the affidavit and underlying facts and circumstances sheet to the SCT on appeal. " In effect, the State has asked us to make a ruling on something that has not even been presented to us....The State has failed to meet its duty. "

(2) Based on a plain reading of both the Mississippi and U.S. Constitutions, the State's case fails. The warrant is void and unenforceable on its face. Section one of the warrant describing the place to be searched was completely blank. For the State's incorporation argument to be successful, the affidavit and underlying facts sheet must have been attached to the warrant. The underlying facts and circumstances sheet and the affidavit were sealed at the time of the search and were not attached to the warrant.

(3) The good faith exception is inapplicable in this case. A warrant with a blank section is clearly, facially defective.

To read the full opinion, click here:
https://courts.ms.gov/Images/Opinions/CO104456.pdf

Willie Lee Madden Jr. v. State, No. 2013-CT-00159-SCT (Miss. June 11, 2015). The COA denied Madden's PCR appeal last year, (***Madden v. State***, No. 2013-CP-00159-COA (Miss.Ct.App. May 13, 2014)), which alleged he received an illegal sentence as an habitual offender. The COA found the PCR procedurally barred. The SCT granted certiorari last December. The SCT subsequently entered an order dismissing the grant of certiorari. Justice Kitchens entered a written objection to the order. He argued Madden's sentence was illegal, so the case was not procedurally barred. Madden was convicted of sale of a controlled substance. Under §99-19-81, the trial court was bound to sentence Madden to a term of 30 years, day-for-day. Instead, Madden's sentence was 15 years, day-for-day. Without an on-the-record of finding of disproportionality, the sentencing judge was without authority to sentence Madden, as an habitual criminal under §99-19-81, to anything other than 30 years' imprisonment. Justice Dickinson agreed, but did not think the Court could review the error sua

sponte. The State has no constitutional protection from an illegally lenient sentence. Justice King believed Madden was entitled to an evidentiary hearing, as the record seems to indicate the State's dropped the habitual offender enhancement prior to Madden's open plea.

To read the order and objections, click here:
http://courts.ms.gov/Images/Opinions/199090.pdf

MDOC v. The Roderick & Solange MacArthur Justice Center, No. 2015-TS-00431-SCT (Miss. June 11, 2015). On March 6, 2015, the Hinds County Chancery Court ordered MDOC to disclose information regarding its execution protocols to the MacArthur Justice Center. MDOC filed for an emergency stay pending appeal. The MSSCT granted the stay and denied a request by MacArthur that executions be halted during the pendency of the the appeal. The Court did order that the appeal by expedited. Justice Kitchens filed a written objection to the Court's order, arguing the chancery ruling should not be stayed pending appeal.

To read the full order and objection, click here:
http://courts.ms.gov/Images/Opinions/198740.pdf

Six Thousand Dollars ($6,000) v. State of Mississippi Ex Rel. Mississippi Bureau of Narcotics, No. 2013-CT-01034-SCT (Miss. August, 27, 2015)

CASE: Civil Forfeiture

COURT: Jefferson Davis County Circuit Court
TRIAL JUDGE: Hon. Anthony Alan Mozingo

APPELLANT ATTORNEY: Thomas P. Welch, Jr.
APPELLEE ATTORNEY: Senica Manuel Tubwell

DISPOSITION: COA Affirmed. King, Justice, for the Court. Waller, C.J., Dickinson and Randolph, P.JJ., Lamar, Kitchens, Chandler, Pierce and Coleman, JJ., Concur.

ISSUES: (1) Whether the COA erred in finding the verdict was not against the overwhelming weight of the evidence; and (2) whether the COA erred in affirming the trial court's decision to permit expert testimony.

FACTS: Anthony Brown filed a petition in circuit court contesting the forfeiture of $6,000 seized by MBN. On January 22, 2012, John Norman Cole was arrested after he failed to stop at a driver's license checkpoint Jefferson Davis County. After a short police pursuit, Cole crashed his Toyota Camry into the rear of a trailer approximately 5 miles from the checkpoint. Cole fled the accident scene on foot, but was later apprehended about 200 yards from the crash site. A roll of money ($6,000), secured by a rubber band, and a clear plastic bag containing what was later determined to be cocaine, was found on the ground in the immediate area of Cole's arrest. Another bag of marijuana was also found. The currency was seized and MBN sought forfeiture of the currency. Brown claimed that he was the innocent owner of the cash. He said Cole was going to Hattiesburg to give the money to his cousin to purchase a vehicle for him. Brown claimed his cousin then told him he should not

buy the car and Cole was returning the money to him when he was arrested. MBN Agent Heather Sullivan and Keith McMahan, a forensic scientist with the Mississippi Crime Laboratory, were listed as state witnesses, but were not designated as experts until trial. Agent Sullivan testified that, based on her training and experience, the circumstances indicated the currency was "drug money." She also testified Cole denied having any knowledge about the money. At the conclusion of bench trial, the trial court found MBN proved, by a preponderance of the evidence, that the currency in question was used, or intended for use, in violation of the Uniform Controlled Substances Law and that Brown's assertion that he was an innocent owner of the currency lacked credibility. Brown appealed, but the COA affirmed. ***Six Thousand Dollars ($6,000) v. State of Mississippi Ex Rel. Mississippi Bureau of Narcotics***, No. 2013-CA-01034-COA (Miss.Ct.App. September 30, 2014). The SCT granted certorari.

HELD: (1) The COA did not err. The innocent-owner exception to the forfeiture statute does not require actual presence at the time of seizure, but it does require the claimant to satisfy standing. Brown's sole link to the currency found in Jefferson Davis County was his own testimony, which the trial court found lacked credibility. Without proof that Brown was the actual owner of, or even had an ownership interest in, the specific defendant currency, Brown's claim, by default, must fail.

(2) It was error to allow Agents McMahan and Sullivan to testify as experts, because the MBN did not timely disclose them as expert witnesses under Rule 4.04A, and because the MBN failed to show special circumstances existed for the untimely designations. Although it was error to allow Agents McMahan and Sullivan to testify as experts, because Brown failed to establish an ownership interest in the seized currency, the error was harmless error. Further, Brown was not required to request a continuance under Rule 4.04A. Brown properly objected to the untimely disclosure of the agents as expert witnesses, and failure to request a continuance did not result in waiver of the issue.

To read the full opinion, click here:
http://courts.ms.gov/Images/Opinions/CO106082.pdf

U.S. SUPREME COURT NOTES:

Rodriguez v. United States, 135 S.Ct. 1609, No. 13-9972 (April 21, 2015). The U.S. Supreme Court held, 6-3, (Justice Ginsburg for the Court, joined by Roberts, C.J., Scalia, Breyer, Sotomayor, and Kagan, J.J. Separate dissenting opinions by Kennedy, Thomas, Alito, JJ.), that once a traffic stop is completed, a dog sniff is unreasonable without additional reasonable suspicion.

On March 27, 2012, a Nebraska K-9 police officer pulled over a vehicle driven by Dennys Rodriguez after his vehicle veered onto the shoulder of the highway. The officer issued a written warning and then asked if he could walk the K-9 dog around Rodriguez's vehicle. Rodriguez refused, but the officer instructed him to exit the vehicle and then walked the dog around the vehicle. The dog alerted to the presence of drugs, and a large bag of methamphetamine was found. The search resulted in a seven to eight minute extension of the completed traffic stop. In ***Illinois v. Caballes***, 543 U. S. 405 (2005) the Court held that the Fourth Amendment was not violated by a dog sniff conducted during a traffic stop. He was convicted in federal district court and the 8th Circuit affirmed, holding the search was constitutional because the brief delay before employing the dog did not unreasonably prolong the otherwise lawful stop. The U.S. Supreme Court reversed, holding that an extension of

time beyond the original purpose of the stop, absent reasonable suspicion, violates the Constitutional protection against unreasonable search and seizure. A stop remains reasonable for the length of time it takes to complete the task that justified the stop. A seizure unrelated to the reason for the stop is lawful only so long as it does not measurably extend the stop's duration. Although the use of a K-9 unit may cause only a small extension of the stop, it is not fairly characterized as connected to the mission of an ordinary traffic stop and is therefore unlawful.

To read the full opinion, click here:
http://www.supremecourt.gov/opinions/14pdf/13-9972_p8k0.pdf

City and County of San Francisco California et. al v. Sheehan, 135 S.Ct. 1765, No. 13-1412 (May 18, 2015). The U. S. Supreme Court held, 6-2, (Alito, J., for the Court, in which Roberts, C.J., and Kennedy, Thomas, Ginsburg, and Sotomayor, JJ., joined. Scalia J., filed an opinion concurring in part and dissenting in part, in which Kagan, J., joined. Breyer, J., took no part in the consideration or decision of the case), that police officers are entitled to qualified immunity under 42 U.S.C. § 1983 because there is no clearly established law addressing the issue of necessity to accommodate for mental illness.

Police were dispatched in response to erratic behavior by Teresa Sheehan. Sheehan was living in a group home. She suffered from a schizoaffective disorder. The officers entered Sheehan's room after announcing themselves. She brandished a knife, threatening the officers. Sheehan closed the door when the officers retreated from her room. While waiting for backup, the officers reentered her room, and Sheehan charged them with the knife. When pepper-spray failed to subdue her, the officers shot her. Sheehan sued, alleging police violated her rights under the Americans with Disabilities Act (ADA) because they failed to accommodate her disability during the arrest. The federal district court granted summary judgment for the City and the officers. The Ninth Circuit vacated in part. The Supreme Court held that public officials are entitled to qualified immunity unless they have violated a clearly established constitutional or statutory right. A right is not clearly established unless a reasonable official in that public official's shoes would have understood his actions to be in violation of that right. In this case, the officers' second entry into Sheehan's room without a warrant did not violate the 4th Amendment because officers may enter a home without a warrant in an emergency situation when there is potential for injury to the occupant. The Court also held that the officers' use of force was reasonable under the circumstances, even to the extent of firing multiple rounds.

To read the full opinion, click here:
http://www.supremecourt.gov/opinions/14pdf/13-1412_0pl1.pdf

Henderson v. United States, 135 S.Ct. 1780, No. 13-1487 (May 18, 2015). The U. S. Supreme Court unanimously held (Kagan, J.), that a court-ordered transfer of a felon's firearms to a third party is not barred by 18 U.S.C. §922(g) if the court is reasonably sure the third party will not give the felon control over the firearms.

Tony Henderson was a former United States Border Patrol Agent who was charged with, among other crimes, distribution of marijuana. Two days after he was arrested, Henderson voluntarily turned 19 firearms over to the FBI, which he argued was for "safekeeping as a condition of the bond." He later pled guilty to his narcotics charges. Henderson subsequently requested that the FBI return his

firearms so that he could transfer them to a purported buyer, but the FBI refused. Henderson then moved the district court to allow him to transfer the firearms to the buyer or his wife. The federal district court denied the request since Henderson was a convicted felon. The 11th Circuit affirmed. The U.S. Supreme Court vacated the ruling, concluding the court-order transfer of firearms from the FBI to a third party is not barred by 18 U.S.C.§922(g), as long as the Court is satisfied that the felon will not obtain direct or indirect control of the firearms.

To read the full opinion, click here:
http://www.supremecourt.gov/opinions/14pdf/13-1487_l6gn.pdf

Elonis v. United States, 135 S.Ct. 2001,No. 13-893 (June 1, 2015). The U. S. Supreme Court held, 7-2, that for a person to be convicted of transmission of threats in interstate commerce (18 U.S.C.§875(c)), the jury must conclude that the convicted person intended for their communication to be a threat to injure another person.

After his wife left him in 2010, Anthony Elonis used the pseudonym "Tone Dougie" to post several obscene and ominous rap lyrics on Facebook. Although Elonis included disclaimers to preface his lyrical tirades, he was indicted for using social media to communicate threats. He was convicted on 4 out of 5 counts, for using social media to communicate threats to injure his ex-wife, law enforcement officers, a kindergarten class, and a FBI agent. He was acquitted of communicating similar messages to patrons and employees of the park. On appeal, he argued he was denied a request that the jury be instructed to consider whether he intended to communicate threats. The 3rd Circuit agreed that the jury instruction would be improper since the statute required only an intent for Elonis to understand his words and that a reasonable person could perceive the content as threatening. The U.S. Supreme Court reversed, holding that criminal statutes implicitly include scienter requirements. The prosecution needed to show that Elonis intended the posts to be threats, and therefore that there was a subjective intent to threaten. An objective reasonable person standard does not go far enough to separate innocent, accidental conduct from purposeful, wrongful acts. The Court held that, in this case, an objective standard would risk punishing an innocent actor because the crucial element that makes this behavior criminal is the threat, not merely the posting.

To read the full opinion, click here:
http://www.supremecourt.gov/opinions/14pdf/13-983_7l48.pdf

Mellouli v. Lynch, 135 S.Ct. 1980, No. 13-1034 (June 1, 2015). The U. S. Supreme Court held, 7-2, (Ginsburg, J., for the Court, in which Roberts, C.J., and Scalia, Kennedy, Breyer, Sotomayor, and Kagan, JJ., joined. Thomas, J., filed a dissenting opinion, in which Alito, J., joined), that a lawful alien resident may only be deported if convicted of a drug-related state crime if the drug is a federally regulated substance.

Moones Mellouli, a citizen of Tunisia, pled guilty to a misdemeanor offense under Kansas law for the possession of a drug paraphernalia. (He had been arrested for DUI when officers found four tablets of Adderall in his sock). The government subsequently attempted to deport Mellouli pursuant to the Immigration and Nationality Act, which states that aliens convicted under any law "relating to a controlled substance" are deportable. The U.S. Supreme Court ultimately held that Mellouli's Kansas conviction for concealing unnamed pills in his sock did trigger removal. A drug conviction

under state law triggers deportation only if the crime falls within a category of deportable offenses defined by federal law. It has long been established that, if a state criminalizes certain "narcotics" not listed as a "narcotic drug" under federal law, a state conviction cannot serve as the basis for deportation.

To read the full opinion, click here:
http://www.supremecourt.gov/opinions/14pdf/13-1034_3dq4.pdf

Brumfield v. Cain, 135 S.Ct. 2269, No. 13-1433 (June 18, 2015). The U. S. Supreme Court held, 5-4, (Sotomayor, J., for the Court, in which Kennedy, Ginsburg, Breyer, and Kagan, JJ., joined. Thomas, J., filed a dissenting opinion, in all but Part I-C of which Roberts, C.J., and Scalia and Alito, JJ., joined. Alito, J., filed a dissenting opinion, in which Roberts, C.J., joined), that if an individual brings up an *Atkins* claim regarding their intellectual capacity, and has fulfilled the requirements necessary for a hearing, then they are entitled to present evidence of their intellectual disability to the court.

In 1995, Kevan Brumfield was convicted of the murder of a Louisiana police officer and sentenced to death. In state post-conviction, Brumfield requested funds to assist him in proving he was intellectually disabled under *Atkins*. The trial court dismissed the claim without a hearing, finding Brumfield did not present enough evidence to establish he was mentally impaired. The Louisiana Supreme Court denied his appeal without explanation. In federal habeas, he was granted funds to develop the claim. The federal district court held, with the new evidence, that Brumfield established a prima facie case of mental retardation. The 5th Circuit reversed, and held that the state court's ruling on Brumfield's *Atkins* claim constituted a decision on the merits, so the district court was prevented from reviewing the decision unless the state court's decision was contrary to clearly established federal law or based on an unreasonable determination of the facts. The U.S. Supreme Court reversed. The Court held that the state trial court's decision that Brumfield did not present sufficient evidence of mental impairment was an unreasonable determination of the facts, and therefore the federal district court could review the state court's decision.

The state court's decision rested on its determination that Brumfield's IQ score was not low enough to prove that he had subaverage intelligence and that Brumfield did not show that his adaptive skills were impaired. However, an IQ test has a margin of error that, if applied to the score in this case, would place Brumfield in the category of subaverage intelligence; therefore, the state court could not definitively preclude the possibility that Brumfield satisfied this criterion, and to hold otherwise was unreasonable. Additionally, the factual record presented to the state court provided sufficient evidence to question Brumfield's adaptive skills. Because Brumfield only needed to raise reasonable doubt regarding his intellectual capacity to be entitled to an evidentiary hearing, the state court's decision that Brumfield did not meet that low threshold was unreasonable.

To read the full opinion, click here:
http://www.supremecourt.gov/opinions/14pdf/13-1433_bpm1.pdf

Davis v. Ayala, 135 S.Ct. 2187, No. 13-1428 (June 18, 2015). The U. S. Supreme Court held, 5-4, (Alito, J., for the Court, in which Roberts, C.J., and Scalia, Kennedy, and Thomas, JJ., joined. Kennedy, J., and Thomas, J., filed concurring opinions. Sotomayor, J., filed a dissenting opinion, in

which Ginsburg, Breyer, and Kagan, JJ., joined), that not allowing a criminal defendant's counsel to be present at an ex parte hearing explaining why potential jurors were excluded wass a harmless error.

Hector Ayala was convicted of murder and sentenced to death. He appealed his conviction on the ground that during the jury selection process the prosecutor's peremptory challenges were impermissibly based on race and his Constitutional rights were violated when the trial judge allowed the prosecution to explain the reasoning for the strikes in ex parte hearings without Ayala's counsel present. The California Supreme Court found the trial court had erred but the error was harmless. The 9th Circuit granted Ayala habeas relief, holding that the error was not harmless. The U.S. Supreme Court overturned the decision and held any error was harmless. Ayala did not establish that he was actually prejudiced by the error and only established mere speculation of prejudice, which the Court stated was not enough. Ayala did not establish his counsel would have convinced the judge that the reasoning for the jury strikes was pre-textual.

To read the full opinion, click here:
http://www.supremecourt.gov/opinions/14pdf/13-1428_1a7d.pdf

McFadden v. United States, 135 S.Ct. 2298, No. 14-378 (June 18, 2015). The U. S. Supreme Court unanimously held (Thomas, J., for the Court, in which Scalia, Kennedy, Ginsburg, Breyer, Alito, Sotomayor, and Kagan, JJ., joined. Roberts, C.J., filed an opinion concurring in part and concurring in the judgment), that under the Controlled Substances Analogue Enforcement Act of 1986, the knowledge requirement is met if the defendant knew the analogue substance was a controlled substance or an analogue, or knew the specific features that made it a controlled substance.

Stephen McFadden sold overstocked products on the Internet to augment his income. In 2011, McFadden noticed that a lot of businesses where he lived were selling a product known as "bath salts," an aromatherapy product that emits a stimulating vapor when burned. After confirming that bath salts were not illegal, McFadden began selling them. He continued to sell them until he learned they had been placed on the list of substances that the Controlled Substances Act (CSA) prohibited. He was later indicted for distribution of bath salts by a federal grand jury. Federal law allows substances not listed as "controlled" to be treated as illegal if the analogue has effects and a chemical make-up that are "substantially similar" to those listed in the CSA. McFadden argued that the government needed to prove that he was aware, or actively resisted finding out, that the bath salts were substantially similar to a controlled substance and constituted an analogue. Instead, the district court held that the government only needed to prove that he knew "the products were intended for human consumption." The 4th Circuit affirmed his conviction. The U.S. Supreme Court reversed. The government must prove that the defendant knew that he was dealing with a controlled substance when it is an analogue.

To read the full opinion, click here:
http://www.supremecourt.gov/opinions/14pdf/14-378_k537.pdf

Ohio v. Clark, 135 S.Ct. 2173, No. 13–1352 (June 18, 2015). The U. S. Supreme Court unanimously held (Alito, J., for the Court, joined by Roberts, C.J., Kennedy, Breyer, Sotomayor, and Kagan JJ. Scalia, J. filed a concurring opinion joined by Ginsburg, J., and Thomas, J. filed a separate concurring opinion), that introduction of statements by child's teacher regarding an allegation of child abuse do

not violate the Confrontation Clause when the primary purpose is not prosecution.

In 2010, a preschool teacher noticed some facial injuries on one of her three-year-old students. When the teacher inquired about the injuries, the student indicated that his mother's boyfriend, Darius Clark, caused them. The teacher forwarded her concerns to a child-abuse hotline, which resulted in the arrest and subsequent charging of Clark for child abuse. At trial, the court allowed testimony by the preschool teacher of the child's identification of Clark as the abuser. Clark was convicted, but the Ohio Supreme Court determined that the statements were testimonial and should have been excluded because they served the purpose of being used in prosecution. Because state law required the teacher to report suspected incidences of child abuse, the teacher was acting as an agent for law enforcement when inquiring about the child's injuries. The U.S. Supreme Court reversed, finding that the three-year-old's statements were non-testimonial. The totality of the circumstances indicated that the primary purpose of the conversation was not to create an out-of-court substitute for trial testimony. In this case, there was an ongoing emergency because the child, who had visible injuries, could have been released into the hands of his abuser, and therefore the primary purpose of the teachers' questions was most likely to protect the child. Moreover, a very young child who does not understand the details of the criminal justice system is unlikely to be speaking for the purpose of creating evidence. Finally, the Court held that a mandatory reporting statute does not convert a conversation between a concerned teacher and a student into a law enforcement mission aimed primarily at gathering evidence for a prosecution.

To read the full opinion, click here:
http://www.supremecourt.gov/opinions/14pdf/13-1352_ed9l.pdf

City of Los Angeles v. Patel, et al, 135 S.Ct. 2443, No. 13–1175 (June 22, 2015). The U. S. Supreme Court held, 5-4, (Sotomayor, J., for the Court, in which Kennedy, Ginsburg, Breyer, and Kagan, JJ., joined. Scalia, J., filed a dissenting opinion, in which Roberts, C.J., and Thomas, J., joined. Alito, J., filed a dissenting opinion, in which Thomas, J., joined), that a city ordinance that requires hotels to provide to police their guest registries without a warrant violates the 4th Amendment.

Naranjibhai and Ramilaben Patel, hotel owners, brought a suit against the City of Los Angeles for a local ordinance that mandates hotels to retain their records for 90 days on hotel property and be made available for inspection by the police department on demand, without a warrant. The city argued that motels are "closely regulated" businesses and are therefore subject to warrantless inspections. The district court upheld the law, ruling that hotel owners have no expectation of privacy when it comes to their registries. The Ninth Circuit eventually struck down the law. The court concluded "the search of hotel registries was plainly a search under the Fourth Amendment, and the ordinance was unconstitutional on its face because it did not provide for any pre-compliance judicial review." The U.S. Supreme Court granted certiorari and affirmed.

The Court held that an individual may challenge a statute for violating the Constitution on its face without needing to allege unconstitutional enforcement, and that the municipal ordinance in question is unconstitutional on its face because it does not allow for hotel operators to engage in pre-compliance review by questioning the reasonableness of the subpoena in district court. The type of search the municipal ordinance authorizes is an administrative one, which means that its purpose is to ensure that the hotel operators are complying with the record requirement, and judicial precedent

has held that there must be an opportunity for the subpoenaed party to contest the subpoena for an administrative search before penalties are imposed. Such pre-compliance review is necessary to ensure that the search is not a pretext to harass the business owner. The Court also held that hotels are not a "closely regulated" business and therefore do not fall under that exception to the warrant requirement.

To read the full opinion, click here:
http://www.supremecourt.gov/opinions/14pdf/13-1175_k537.pdf

Kingsley v. Hendrickson, 135 S.Ct. 2466, No. 14-6368 (June 22, 2015). The U. S. Supreme Court held, 5-4, (Breyer, J. for the Court, joined by Kennedy, Ginsburg, Sotomayer, and Kagan, JJ. Scalia, J. filed a dissenting opinion, joined by Roberts, C.J. and Thomas, J. Alito, J. filed a separate dissent), that Under a § 1983 claim, a pretrial detainee must show only that the force used against that detainee was "objectively unreasonable," not that state actors "recklessly disregarded" detainee safety or "acted with reckless disregard" of constitutional rights.

In May 2010, Michael Kingsley, a pretrial detainee, was ordered to take down a piece of paper covering the light above his cell bed but refused to do so. He was later forcibly moved to another cell and eventually tasered. Kingsley sued Sergeant Stan Hendrickson and other jail staff members, claiming their actions violated his due process rights under the 14th Amendment. The jury found for the officers. Kingsley appealed and suggested that the district court wrongly combined the standards for excessive force under the 8th and 14th Amendments, and as a result, provided erroneous jury instructions. The 7th Circuit affirmed. The U.S. Supreme Court vacated and remanded the 7th Circuit's decision, holding that (1) under a § 1983 claim, a pretrial detainee must show only that the force used against him was "objectively unreasonable" and (2) that therefore the jury instruction that said that the appellant was required to prove that the officers "recklessly disregarded" his safety and "acted with reckless disregard of his rights" was erroneous.

To read the full opinion, click here:
http://www.supremecourt.gov/opinions/14pdf/14-6368_7lhn.pdf

Johnson v. United States, 135 S.Ct. 2551, No. 13-7120 (June 26, 2015). The U. S. Supreme Court held, 8-1, (Scalia, J., for the Court, in which Roberts, C.J., and Ginsburg, Breyer, Sotomayor, and Kagan, JJ., joined. Kennedy, J., and Thomas, J., filed opinions concurring in the judgment. Alito, J., filed a dissenting opinion), that the residual clause of the Armed Criminal Career Act (ACCA)—that defines a "violent felony" as one involving "conduct that presents a serious potential risk of physical injury to another"—is unconstitutionally vague.

After Samuel Johnson pled guilty to being a felon in possession of a firearm, the government sought an enhanced sentence under the residual clause of the Armed Career Criminal Act (ACCA). The Act imposes an increased prison term upon a defendant with three prior "violent felony" convictions. Johnson had prior convictions for attempted simple robbery, simple robbery, and possession of a short-barreled shotgun. The District Court upheld the increased sentence and the 8th Circuit affirmed. The U.S. Supreme Court reversed, holding that the residual clause of the ACCA—which defines a "violent felony" as one involving "conduct that presents a serious potential risk of physical injury to another"—is unconstitutionally vague. Because the residual clause of the ACCA gives no guidelines

for how the court can assess whether the conduct in question poses a "serious potential risk of physical injury" and therefore qualifies as a violent felony, the residual clause allows for unpredictable and arbitrary enforcement in violation of the Due Process Clause.

To read the full opinion, click here:
http://www.supremecourt.gov/opinions/14pdf/13-7120_p86b.pdf

Maryland v. Kulbicki, No. 14-848 (October 5, 2015). The U.S. Supreme Court held, per curiam, that an appellate court violates the core principles of *Strickland v. Washington* when it conducts a post-hoc assessment of trial counsel's performance based on scientific advances not available at the time of trial.

In 1993, James Kulbicki shot his 22-year-old mistress in the head at point blank range. At Kulbicki's trial, an FBI agent testified as the State's expert on Comparative Bullet Lead Analysis, or CBLA. In post-conviction proceedings, Kulbicki added a claim in 2006, that his counsel were ineffective for failing to challenge the CBLA testimony. Kulbicki cited a 1991 report co-written by the expert FBI agent which "presaged the flaws in CBLA evidence." (CBLA evidence was found unreliable by the Maryland Court of Appeals in 2006). In granting Kulbicki's post-conviction petition, the Maryland Court of Appeals held that any good attorney should have spotted the methodological flaw in the FBI agent's CBLA testimony. The U.S. Supreme Court reversed per curiam. At the time of Kulbicki's trial in 1995, the validity of CBLA was widely accepted, and courts regularly admitted CBLA evidence until 2003. There is no reason to believe that a diligent search would even have discovered the supposedly crucial 1991 report that would have allowed a better cross-examination of the expert. In assessing effectiveness of counsel, courts should apply the "rule of contemporary assessment of counsel's conduct," requiring consideration of the reasonableness of the challenged conduct at the time in which the counsel's conduct occurred.

To read the full order, click here:
http://www.supremecourt.gov/opinions/15pdf/14-848_pok0.pdf

MISSISSIPPI COURT OF APPEALS CRIMINAL DECISIONS
April 14, 2015 – September 29, 2015

COA DIRECT APPEAL CASES

April 14, 2015

Markeith D. Fleming v. State, No. 2013-KA-01858-COA (Miss.Ct.App. April 14, 2015)

CASE: Murder and Aggravated Assault
SENTENCE: Consecutive sentences of life and 20 years, respectively

COURT: Attala County Circuit Court
TRIAL JUDGE: Hon. C.E. Morgan, III

APPELLANT ATTORNEY: Hunter Nolan Aikens
APPELLEE ATTORNEY: Scott Stuart
DISTRICT ATTORNEY: Doug Evans

DISPOSITION: Affirmed. Carlton, J., for the Court. Lee, C.j., Irving and Griffis, P.jj., Barnes, Ishee, Maxwell and James, Jj., Concur. Roberts and Fair, Jj., Concur in Part and in the Result Without Separate Written Opinion.

ISSUES: (1) Whether the trial court erred in denying his motion for a continuance; (2) whether Fleming received ineffective assistance of counsel; and (3) whether the verdict was against the overwhelming weight of the evidence.

FACTS: On September 1, 2012, Derrick Hannah and his cousin, Christopher Graham, were shot while driving home from Kosciusko. Graham was killed, but Hannah survived, although paralyzed from the chest down. Hannah, testified that as a white car approached them on the road, Graham, who was driving, said "they about to shoot us," and Hannah "looked right quick" and started ducking. Hannah testified that he possessed "no doubt" that Markeith Fleming was the shooter. Hannah testified that he observed no other person in the white car with Fleming. The record also reflects that Fleming's girlfriend drove a white Altima. Cell phone records presented at trial placed Fleming in the same area as the murder, shortly before the murder occurred. The State used an AT&T engineer to introduce the cell phone records, but did not tender him as an expert. The trial court denied a continuance for Fleming to consult his own expert about the cell phone records.

HELD: (1) The trial judge did not abuse his discretion in admitting the AT&T engineer's testimony as a lay witness. The defense received the cell-phone records six months prior to the trial date, and received notice of the engineer as a State witness approximately two weeks prior to trial. Accordingly, there was no abuse of discretion in the trial court's denial of Fleming's request for a continuance.

(2) Fleming argued that his trial counsel was deficit in allowing the State to elicit expert testimony from the AT&T engineer without first tendering him as an expert witness. The record fails to reflect

any merit to Fleming's claim of ineffective assistance of counsel. Since the trial judge did not err in admitting the testimony into evidence at trial, there was no ineffective assistance. The testimony was rationally based upon the information set forth in the disclosed phone records. The trial court admitted the phone records into evidence at trial without objection, and the testimony provided a helpful and clear understanding of the records. Fleming can raise this issue again on PCR.

(3) Fleming argued that the trial court's refusal to grant him a continuance to prepare for engineer's testimony, as well as the improper admission of the testimony, resulted in a manifest miscarriage of justice. Fleming also asserted that although Hannah claimed to see Fleming point a gun from the white car, Hannah also admitted that he only "looked right quick" and started ducking before shots were fired. The verdict was not against the weight of the evidence.

To read the full opinion, click here:
http://courts.ms.gov/Images/Opinions/CO102170.pdf

Kendall Williams v. State, No. 2013-KA-01856-COA (Miss.Ct.App. April 14, 2015)

CASE: Possession of an Unauthorized Device in a Correctional Facility
SENTENCE: 3 years, with 2 suspended and one year of House Arrest

COURT: Quitman County Circuit Court
TRIAL JUDGE: Hon. Johnnie E. Walls Jr.

APPELLANT ATTORNEY: Hunter Nolan Aikens, George T. Holmes
APPELLEE ATTORNEY: Stephanie Breland Wood
DISTRICT ATTORNEY: Brenda Fay Mitchell

DISPOSITION: Reversed and Remanded. Griffis, P.J., for the Court. Lee, C.J., Irving, P.J., Barnes, Ishee, Roberts, Maxwell and Fair, JJ., Concur. Carlton, J., Dissents Without Separate Written Opinion. James, J., Not Participating.

ISSUE: Whether the trial court erred when it failed to conduct a hearing on the voluntariness of defendant's written confession before admitting the statement into evidence.

FACTS: Kendall Williams was incarcerated in the Quitman County Jail on a child-support lock-up order. On August 7, 2012, Darryl Linzy, an officer with the Sheriff's Department, went to Williams's cell when he smelled smoke and discovered that Williams and his cellmate possessed cigarettes and a lighter. Linzy then asked Williams and his cellmate if they had any other contraband in the cell. One or both of the men declared that a cell phone was on the bottom bunk. Linzy found a black and grey cell phone on the bottom bunk. Linzy testified that he informed Williams of his *Miranda* rights and obtained a valid waiver before he questioned Williams. During the interrogation, Williams gave Linzy the cell-phone number of the phone found in the cell. Williams eventually gave an oral confession and claimed that he owned the phone. Linzy reduced the confession to writing. This was the same phone Williams initially had when he was first booked into the jail. The phone was given to Williams's sister. Apparently Williams left the jail on two prior occasions during his incarceration. At trial, the State moved to admit the confession, but the defense objected, arguing that Williams had

not been given the opportunity to cross-examine Linzy regarding the waiver of his rights. The objection was overruled and Williams was convicted.

HELD: Williams asserts that the trial court erred in failing to hold a hearing on the voluntariness of his confession. Though Williams undoubtedly made an objection to the statement's admission, the objection did not unequivocally raise the issue of voluntariness, which would mandate a hearing. Even though no suppression motion was filed, a confession's voluntariness may be raised for the first time at trial.

In order to find a statement admissible, the trial judge must determine beyond a reasonable doubt that a confession was voluntary and knowing and that the defendant was given his *Miranda* rights prior to any custodial interrogation. By not holding a hearing, the trial court precluded Williams from putting on evidence to refute Linzy's testimony. The trial court improperly admitted the confession into evidence without ruling on the voluntariness of the statement at any point.

To read the full opinion, click here:
http://courts.ms.gov/Images/Opinions/CO100391.pdf

Antonio D. Sanders v. State, No. 2014-KA-00399-COA (Miss.Ct.App. April 14, 2015)

CASE: Armed Robbery and Felon in Possession of a Firearm
SENTENCE: 20 years with 5 suspended and 5 years PRS for the armed robbery, and a concurrent 5 years for felon in possession charge

COURT: Washington County Circuit Court
TRIAL JUDGE: Hon. Richard A. Smith

APPELLANT ATTORNEY: Justin Taylor Cook
APPELLEE ATTORNEY: Melanie Dotson Thomas
DISTRICT ATTORNEY: Willie Dewayne Richardson

DISPOSITION: Affirmed. Griffis, P.J., for the Court. Lee, C.J., Irving, P.j., Barnes, Ishee, Roberts, Carlton, Maxwell, Fair and James, JJ., Concur.

ISSUE: Whether the verdict was against the weight of the evidence.

FACTS: Antonio Sanders worked at a Captain D's restaurant in Greenville. On July 29, 2012, Sanders went to the restaurant while several employees were in the process of closing. Sanders was dressed in all black clothing, with dark sunglasses, and a bandana around his face. While brandishing a gun, Sanders ordered the employees to hand over the money in the restaurant. Sanders did not obtain any money. He eventually walked out of the back of the restaurant after being recognized by the employees. The employees told police that the robber had a teardrop tattoo on his face similar to Sanders, and they recognized Sanders's voice. They also gave police a description of the car that left the scene, which matched the car Sanders usually drove. Based on this information, police stopped Sanders and his girlfriend shortly after the attempted robbery. Police searched the car, but did not find a gun or dark clothing. Sanders was convicted and appealed.

HELD: The State presented evidence that established Sanders perpetrated the crime. Sanders offered evidence of an alibi during the incident from his girlfriend. The jury determines credibility. Even though there was no physical evidence, the trial court did not abuse its discretion in denying Sanders's motion for a new trial.

To read the full opinion, click here:
http://courts.ms.gov/Images/Opinions/CO101652.pdf

Kenneth Washington v. State, No. 2014-KM-00756-COA (Miss.Ct.App. April 14, 2015)

CASE: Misdemeanor – Disturbing the Peace
SENTENCE: unknown

COURT: Copiah County Circuit Court
TRIAL JUDGE: Hon. Lamar Pickard

APPELLANT ATTORNEY: Kenneth Washington (Pro Se)
APPELLEE ATTORNEY: Stephanie Breland Wood

DISPOSITION: Dismissal of Justice Court Appeal Affirmed. Griffis, P.J., for the Court. Lee, C.J., Irving, P.J., Barnes, Ishee, Roberts, Carlton, Maxwell, Fair and James, JJ., Concur.

ISSUE: Whether the circuit court erred in dismissing a justice court appeal as untimely.

FACTS: On June 17, 2013, Kenneth S. Washington was cited for disturbing the peace. After a hearing on September 16, 2013, the Justice Court found Washington guilty. On May 2, 2014, Washington filed his notice of appeal with the circuit clerk. The circuit judge dismissed the appeal as untimely. Washington appealed.

HELD: URCCCP12.02(A)(1) provides 30 days to appeal. Washington has provided no reason for his untimely appeal. Instead, he argued that his conviction was based on perjured testimony, and the State interfered with his right to cross-examine Joshua Johnson, who also received disturbing-the-peace citation during the same incident. The circuit court did not err.

To read the full opinion, click here:
http://courts.ms.gov/Images/Opinions/CO101830.pdf

April 28, 2015

Stedman D. Gilmore v. State, No. 2013-KA-02030-COA (Miss.Ct.App. April 28, 2015)

CASE: Burglary of a Dwelling
SENTENCE: 12 years

COURT: Carroll County Circuit Court
TRIAL JUDGE: Hon. Joseph H. Loper Jr.

APPELLANT ATTORNEY: Mollie M. McMillin
APPELLEE ATTORNEY: Melanie Dotson Thomas
DISTRICT ATTORNEY: Doug Evans

DISPOSITION: Affirmed. Roberts, J., for the Court. Lee, C.J., Griffis, P.J., Barnes, Ishee, Carlton, Maxwell, Fair and James, JJ., Concur. Irving, P.J., Concurs in Part and in the Result Without Separate Written Opinion.

ISSUE: Whether the circuit court abused its discretion in refusing a defense instruction on accessory after the fact and an instruction on ignorance or mistake of fact.

FACTS: In the early morning hours of May 29, 2013, a Vaiden resident heard noises and saw lights outside of her bedroom window. She called 911 and gave a description of the car she saw. She then inspected her yard and found a shotgun. Deputy Ken Banks received the information about the car from the 911 dispatcher, and came upon a car matching the description and driving in the same direction as described. Banks initiated a traffic stop after seeing the driver and front passenger not wearing seatbelts, and he ordered Stedman Gilmore, the car's driver, to exit the vehicle for safety reasons. Upon a search of the car, Banks discovered flashlights and other "out of place" items such as arrows, a bow, a shotgun, and a gas can. Subsequently investigating a nearby cabin, Banks found one that appeared to have been ransacked. He found footprints that matched the shoes belonging to Gilmore. Banks spoke with the cabin's owner, who confirmed the items recovered from the car matched the items stolen from the cabin. In his first statement, Gilmore explained that he did not know anything about the burglary, but that he purchased the items from a local drug user. In his second statement, he admitted that he went to the cabin, but that he did not actually go inside the cabin and was more of a "lookout" for the other men. At trial, Gilmore claimed he was only asked to pick-up some friends at the cabin and did not know it had been burglarized.

HELD: The trial judge did not err in denying an accessory after the fact instruction. First, a defendant is no longer unilaterally entitled to a lesser offense instruction. Second, the trial court found no evidence that Gilmore was aware that a felony had taken place and that he was attempting to help his friends knowing a felony had taken place. He denied ever going into the cabin. He claimed he did not know the others stole items from the cabin, and he in no way helped or assisted them.

There was no evidentiary support for the mistake of fact instruction. Gilmore was indicted for and convicted of burglary of a dwelling, and there was no evidence presented at trial as to how he may have "mistakenly" burglarized a dwelling. Gilmore claimed that he never entered the cabin at all. He did not testify that he mistakenly entered it or mistakenly took items.

To read the full opinion, click here:
https://courts.ms.gov/images/Opinions/CO102966.pdf

May 5, 2015

Lakinta Goldman v. State, No. 2013-KA-00924-COA (Miss.Ct.App. May 5, 2015)

CASE: Armed Robbery x2, Kidnapping x2, and Possession of a Firearm by a Convicted Felon
SENTENCE:

COURT: Montgomery County Circuit Court
TRIAL JUDGE: Hon. C.E. Morgan, III

APPELLANT ATTORNEY: Justin Taylor Cook Lakinta LaVegas Goldman (Pro se)
APPELLEE ATTORNEY: LaDonna C. Holland
DISTRICT ATTORNEY: Doug Evans

DISPOSITION: Affirmed. James, J., for the Court. Lee, C.J., Irving and Griffis, P.JJ., Ishee, Roberts, Carlton, Maxwell and Fair, JJ., Concur. Barnes, J., Concurs in Part and in the Result Without Separate Written Opinion.

ISSUES: (1) Whether Goldman was denied effective assistance of counsel when counsel failed to request an impeachment instruction in support of Goldman's defense; (2) whether the State failed to prove the basis for a habitual-offender sentence enhancement; and (3) whether the trial court violated double jeopardy.

FACTS: On May 22, 2012, the Dollar General in Duck Hill was robbed. The robber, along with another man, wore dark clothing and a mask. He directed everyone in the store to kneel. Karen Foreman, the assistant manager, gave the man the money in the safe, which was approximately $800. Foreman was told not to trigger the silent alarm, and a shot was fired. After the men left, Foreman realized she had her cell phone with her and called 911. Police spotted a 2002 GMC Yukon matching the description of the vehicle connected to the Dollar General robbery. A pursuit ensued, with the occupants throwing things out of the car. The car veered off the road and the occupants fled. Police recovered masks and items from the robbery. The car belonged to Lakinta Goldman's wife. Kunta Kinta Harbin was later apprehended and identified Goldman as the other robber. Goldman told police he only picked up a stranded Harbin, and fled from police because he had marijuana in the car. Cell phone records contradicted Goldman's claims that he was returning from Jackson when he picked up Harbin. Goldman appealed, and his counsel filed a *Lindsey* brief. Goldman filed a supplemental pro se brief

HELD: (1) Goldman argues that his trial counsel failed to "act" as counsel, which resulted in Goldman not receiving adequate assistance of counsel both at the trial-court level and the appellate level. Goldman did receive a jury instruction dealing with the impeachment of Harbin. The record is insufficient to show deficient performance. He can raise the issue again on PCR.

(2) Goldman was properly indicted as a habitual offender. The State presented competent evidence to prove habitual offender status. Goldman was also afforded an opportunity to challenge the habitual-offender status. The issue is without merit.

(3) Goldman was indicted on three counts of armed robbery and kidnapping. Each count related to a different victim. Goldman was also indicted on a charge of possession of a deadly weapon by a felon. No charges were duplicated, and Goldman was not convicted of two crimes that contained the same elements. The issue is without merit.

To read the full opinion, click here:
http://courts.ms.gov/images/Opinions/CO102518.pdf

May 19, 2015

Terrance Richard Campbell v. State, No. 2014-KA-00773-COA (Miss.Ct.App. May 19, 2015)

CASE: Felony DUI
SENTENCE: 5 years

COURT: Harrison County Circuit Court
TRIAL JUDGE: Hon. Lawrence Paul Bourgeois, Jr.

APPELLANT ATTORNEY: W. Daniel Hinchcliff
APPELLEE ATTORNEY: Laura Hogan Tedder
DISTRICT ATTORNEY: Joel Smith

DISPOSITION: Affirmed. Fair, J., for the Court. Lee, C.J., Irving and Griffis, P.JJ., Barnes, Ishee, Roberts, Carlton, Maxwell and James, JJ., Concur.

ISSUE: Whether the jury's verdict was sufficient, as it did not specify whether Campbell was guilty of Count I, Count II, or both.

FACTS: On September 27, 2012, a deputy responding to a domestic-violence call was told that Terrance Campbell had been fighting with a woman and had left. While investigating, Campbell came back driving a black Nissan Maxima. However, Campbell refused the stop when the deputy signaled to him. He drove across a ditch and into a yard. Campbell was belligerent, had red eyes and slurred speech, and smelled of alcohol. The DUI unit was called to the scene. When offered a field sobriety test, he refused and asked to go to jail. After Campbell's arrest, deputies discovered that he had two previous DUI convictions within the last two years. A warrant was obtained to have Campbell's blood-alcohol content (BAC) tested. Campbell's BAC was determined to be .14%. Campbell was charged with Count I: common-law DUI, and Count II: per-se DUI (driving with a BAC over .08%). At trial, the jury was instructed it could find Campbell guilty of common-law DUI or per-se DUI. The jury's verdict only reflected it found Campbell guilty of felony DUI.

HELD: The jury is presumed to follow instructions. The instructions told the jury it could unanimously find guilt under Count I or Count II. Since the evidence was sufficient to support a verdict under either count, the form of the verdict was of no significance.

To read the full opinion, click here:
http://courts.ms.gov/Images/Opinions/CO103413.pdf

Quincy Clayton v. State, No. 2013-KA-01993-COA (Miss.Ct.App. May 19, 2015)

CASE: Manslaughter with Firearm Enhancement

SENTENCE: 20 Years for Manslaughter with a consecutive 5 years for the enhancement

COURT: Jones County Circuit Court
TRIAL JUDGE: Hon. Billy Joe Landrum

APPELLANT ATTORNEY: Erin Elizabeth Pridgen
APPELLEE ATTORNEY: Scott Stuart
DISTRICT ATTORNEY: Anthony J. Buckley

DISPOSITION: Affirmed in Part; Reversed and Remanded in Part. Roberts, J., for the Court. Lee, C.J., Griffis, P.J., Barnes, Ishee, Carlton, Maxwell, Fair and James, JJ., Concur. Irving, P.J., Concurs in Part and Dissents in Part Without Separate Written Opinion.

ISSUES: (1) Whether the trial court erred in failing to apply the *Weathersby's* rule and direct a verdict of acquittal, and (2) whether Clayton's 5 year sentence enhancement under §97-37-37 was illegal under *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

FACTS: On June 21, 2009, Quincy Clayton shot and killed his wife, Alice. Alice's sister Mary, testified the two had been arguing. Alice swung a knife at Clayton a couple of times while they were all in the kitchen. Mary was able to convince Alice to put the knife down. Clayton then began ironing some clothes for church, but Alice pulled them off the ironing board and stomped on them. Alice then went to their bedroom and shut the door. Clayton finished ironing, and he went to the bedroom to retrieve his church shoes. Alice refused to let him in the room to retrieve his shoes. At some point, Clayton got his shotgun and entered the couple's bedroom to get his shoes for church. According to Clayton, Alice came at him with the knife and he accidentally shot her with the shotgun. (Apparently Alice had a knife in her hands when shot). Mary ran to Clayton and the two began wrestling over the shotgun. Clayton let go of the shotgun, and, as he was leaving, he said, "that will shut her up," and "I'm through." Clayton left the house after the shooting and when he passed a police car he stopped and told the officer, "I'm the man y'all are looking for; I just shot my wife." Testimony and photographic evidence at trial showed that Clayton sustained knife wounds on his left shoulder, wrist, and chest. Originally convicted of murder, Clayton's case was reversed for a new trial. *Clayton v. State*, No. 2011-KA-00623-SCT (Miss. December 13, 2012). At the second trial, he was found guilty of manslaughter, which the trial judge enhanced five years for use of a firearm. Clayton appealed.

HELD: (1) The trial judge did not err in failing to apply the *Weathersby* Rule. Clayton claimed that he was the only eyewitness to the shooting, he consistently testified that he acted in self-defense when Alice came at him with a knife, and there was no evidence contradicting his version of the events. However, a jury could reasonably believe that Clayton's version of the incident satisfied the elements of manslaughter, because a jury could have found that Clayton was not acting in necessary self-defense when he shot his wife with a shotgun. Therefore, *Weathersby* does not apply.

(2) Clayton argued that the circuit court improperly enhanced his sentence without having a jury decide every element of the firearm enhancement. The State claimed the jury's verdict of manslaughter was sufficient. However, the jury was only instructed to find Clayton guilty of

manslaughter if he killed Alice "by the use of a dangerous weapon." The jury was never specifically asked to find whether Clayton used a firearm during a felony.

> Based on the jury instruction for manslaughter that was given, the jury did not specifically find, beyond a reasonable doubt, that Clayton used a firearm during the commission of the felony of manslaughter, and we reverse the application of section 97-37-37 and remand for Clayton to be resentenced without the firearm enhancement.

To read the full opinion, click here:
http://courts.ms.gov/Images/Opinions/CO103417.pdf

James Douglas McKnight v. State, No. 2013-KA-01212-COA (Miss.Ct.App. May 19, 2015)

CASE: Murder and Possession of a Firearm by a Convicted Felon
SENTENCE: Life without parole on both counts as an habitual offender, consecutively

COURT: Pike County Circuit Court
TRIAL JUDGE: Hon. David H. Strong, Jr.

APPELLANT ATTORNEY: Charles E. Miller
APPELLEE ATTORNEY: Stephanie Breland Wood
DISTRICT ATTORNEY: Dee Bates

DISPOSITION: Affirmed. Barnes, J., for the Court. Lee, C.J., Irving and Griffis, P.JJ., Ishee, Roberts, Carlton, Maxwell, Fair and James, JJ., Concur.

ISSUES: Whether the evidence was sufficient; (2) whether the verdict was against the overwhelming weight of the evidence; (3) whether probable cause existed to arrest McKnight; (4) whether the circuit court erred in denying McKnight's motion to suppress evidence obtained as a result of the search warrants; (5) whether the circuit court erred in allowing evidence stemming from the photographic lineups; (6) whether McKnight received ineffective assistance of counsel; (7) whether the circuit court erred in failing to order a mental evaluation of McKnight; (8) whether McKnight was entitled to a change of venue; (9) whether the circuit judge's recusal and the withdrawal by the public defender's office due to conflict of interest prejudiced McKnight; (10) whether McKnight's constitutional right to a speedy trial was violated; (11) whether the circuit court erred in admitting evidence of McKnight's prior convictions that were ten years or older and evidence of prior bad acts; (12) whether the circuit court erred in refusing McKnight's jury instruction presenting his theory of defense; (13) whether the circuit court erred in admitting hearsay testimony; (14) whether §97-37-5 is unconstitutional; (15) whether McKnight's sentences were excessive and constituted cruel and unusual punishment; (16) whether §99-19-83 is unconstitutional; and (17) whether cumulative errors and plain error warrant reversal and a new trial.

FACTS: On August 30, 2011, James McKnight called around looking for Derrick Witherspoon, also known as "Twin." Apparently, McKnight was upset because he had not heard from his adult son, James "J.J." McKnight, Jr., in several days, and he suspected that Twin was involved with J.J.'s disappearance. When confronted, Twin claimed he did not know where J.J. was, but McKnight did

not believe him and continued to question him. McKnight finally talked Twin into getting into his SUV, along with his wife, Barbara, and Alreco Hill. McKnight continued to question Twin in the SUV. When McKnight stopped at a traffic light, Twin tried to jump out of the vehicle. McKnight pulled out a .380 and warned Twin that if he tried to run away again, McKnight would shoot him. Regardless, Twin later jumped out the car. According to Hill, McKnight fired two shots and pursued Twin. Hill also got out of the SUV, following McKnight. McKnight fired more shots at Twin, and then McKnight and Hill returned to the SUV. Terry Williams, McKnight's uncle, heard gunfire and saw McKnight running from the SUV. He heard more gunshots and then saw McKnight return to the SUV holding a gun. Police recovered Twin's body, along with shell casings from a .380 caliber gun near where the shots were fired. Twin died of multiple gunshot wounds from a .380 caliber gun. McKnight was later arrested and charged with murder and possession of a firearm by a convicted felon. Barbara and Hill were both charged with accessory after the fact.

HELD: (1) and (2) The evidence was sufficient to support McKnight's convictions on both counts. Twin got into the SUV with McKnight and the others shortly before his death. Hill testified that McKnight threatened Twin with a gun and then fired the gun at Twin multiple times when he ran from the SUV. Twin died as a result of gunshot wounds, and the projectiles retrieved from Twin's body match the caliber of the gun that McKnight was believed to have possessed. McKnight's uncle stated that he saw a gun in McKnight's hand after he heard the gunshots fired. His convictions were not based solely on the testimony of a co-conspirator. Hill was an accessory after the fact, not an accomplice.

(3) McKnight surrendered to authorities in Tulsa, OK, and waived his right to extradition. For the first time in his JNOV and on appeal, he claims his arrest was illegal because it was not based on probable cause. Hill gave a statement to police, claiming that McKnight was responsible for the shooting. This was sufficient probable cause.

(4) McKnight also claimed there was insufficient probable cause to support the issuance of search warrants for his vehicle and mobile phone. However, McKnight never objected to the evidence from his SUV at trial and no evidence from his mobile phone was admitted. The issue was barred.

(5) No evidence of the photographic lineup was presented at trial. The claim is without merit.

(6) The Court found the record did not affirmatively show ineffectiveness. McKnight is free to raise the issue again on PCR.

(7) Prior to being sentenced, McKnight filed a post-trial motion for a psychological evaluation. The court denied it. In his JNOV, McKnight again raised the issue of a psychological evaluation, but provided no evidence to support a finding that he may have been incompetent to stand trial. McKnight claimed on appeal that he "has possible preexisting mental conditions." However, McKnight never stated what those mental conditions are. Although he supplemented the record on appeal, the COA refused to consider anything not presented to the trial judge.

(8) Counsel withdrew his request for a change of venue. The issue is barred from review.

(9) When McKnight's public defender realized he had represented Hill in a bond reduction hearing,

he filed a motion to withdraw. Later, the circuit court discovered he had signed a prior warrant in the case, and transferred the case to another circuit judge. McKnight claims that he was prejudiced by the delay in judge's recusal and counsel's withdrawal due to a conflict of interest. McKnight was tried one month after the judge recused himself. He was not prejudiced from the delay. He was also not prejudiced by counsel's withdrawal. McKnight was granted a continuance and newly appointed counsel had several months to prepare for the trial.

(10) McKnight was not denied a speedy trial. The circuit judge found that the main cause of the trial delay was the substitution of defense counsel six months prior to trial due to a conflict of interest. This did not weigh against the State. McKnight filed a motion to dismiss a week before his trial, instead of filing a motion demanding a speedy trial. Mostly importantly, McKnight's defense was not impaired as a result of the delay.

(11) No evidence of McKnight's prior convictions was ever introduced at trial. Only a stipulation that McKnight was a prior felon was presented. The claim is without merit.

(12) Although McKnight argued that he must be allowed to present an alternate theory of defense, nowhere did he state which jury instruction was allegedly refused. The record contains no evidence that the circuit judge refused any such instruction. This issue is without merit.

(13) A week prior to his murder, Twin talked with Katrina Harris and asked her for money to leave town. He told her that if something happened to him, McKnight did it. The court allowed this testimony under MRE 803(3) as evidence of Twin's existing state of mind. There was no testimony that he was afraid due to any explicit threat by McKnight. The statement should not have been allowed. The statement merely related Twin's belief as to a speculative future event, not his state of mind. This was harmless error. Harris's testimony that Twin had an issue with J.J. and appeared to be afraid is permissible under Rule 803(3).

David Wells, who was with Terry Williams, was questioned as to how he learned the identity of the man he saw running from the SUV. The court allowed him to testify that Williams told him, "That was my nephew James." The circuit judge correctly concluded that Wells's testimony was admissible as either a present-sense impression or an excited utterance.

At trial, J.J. was asked what he had told police regarding what Hill said to him on or around the day Twin was killed. The court allowed J.J. to testify Hill told him McKnight and Twin were arguing and that McKnight pulled a gun. This testimony was admissible under Rule 803(d)(1)(B), to rebut an claim against Hill of recent fabrication. The defense questioned the veracity of Hill's testimony. J.J's statements were admissible to rehabilitate Hill's credibility.

(14) McKnight claimed that his indictment for possession of a firearm by a convicted felon was unconstitutional as it violates the Second Amendment. The SCT has held §97-37-5 is constitutional as a reasonable exercise of police power.

(15) McKnight's claims that his two consecutive life sentences constitute cruel and unusual punishment and are disproportionate under the Eighth Amendment are without merit. McKnight was properly sentenced as a habitual offender.

(16) McKnight also claimed that he was entitled to a jury trial on sentencing because his classification as a habitual offender constituted a capital case, as it subjected him to life imprisonment. McKnight failed to cite any relevant authority to support his argument. The claim is barred and is without merit.

(17) There was no cumulative error. The COA found only one instance of harmless error in the admission of hearsay testimony. This did not require reversal.

To read the full opinion, click here:
http://courts.ms.gov/Images/Opinions/CO102481.pdf

Davarious Levonte Talley v. State, No. 2013-KA-02050-COA (Miss.Ct.App. May 19, 2015)

CASE: Burglary of a Dwelling
SENTENCE: 12 years

COURT: Scott County Circuit Court
TRIAL JUDGE: Hon. Marcus D. Gordon

APPELLANT ATTORNEY: Edmund J. Phillips Jr.
APPELLEE ATTORNEY: Billy L. Gore
DISTRICT ATTORNEY: Mark Sheldon Duncan

DISPOSITION: Affirmed. Barnes, J., for the Court. Lee, C.J., Irving and Griffis, P.JJ., Ishee, Roberts, Carlton, Maxwell, Fair and James, JJ., Concur.

ISSUE: Whether the trial court erred in declining to strike hearsay testimony during defense counsel's cross-examination.

FACTS: Davarious Levonte Talley was convicted of the burglary of Damekia Boone's home in Forest, MS. Talley lived in the same neighborhood as Boone. Among the items stolen were an Xbox Kinect Star Wars Edition video game, a pair of Jordan athletic shoes, and a GPS. Several witnesses testified they saw Talley around Boone's house around the time of the burlgary. Prayer Wright, a 13-year-old eyewitness to the crime who knew Talley through her brother, testified that she had spent the night with her friend who lived near Boone's house. She observed Talley watching Boone's house from a van. Later, Prayer saw Talley enter Boone's house through a window after the Boones left home. During cross-examination, Prayer testified although she saw Talley enter the house, she did not see Talley come out. Several of her friends told her Talley had come out of the backdoor. Defense counsel sort to strike this testimony as hearsay. The trial judge overruled the motion. Talley blamed the burlgary on one of the State's witnesses, 16-year-old Keshun Chandler. He testified Keshun must have left the stolen Xbox in Talley's van. Talley was convicted and appealed.

HELD: The hearsay statements at issue were elicited by Talley's own defense counsel, so this argument is without merit. Regardless of whether Prayer saw Talley exit the house, the crime of burglary involves "breaking and entering" the dwelling house; thus, testimony about entering, not exiting, the house is the key. Prayer did see Talley enter the house through a window, and this

testimony was not hearsay. Additionally, Keshun testified he saw Talley enter and exit from the house. Accordingly, any error was harmless.

To read the full opinion, click here:
http://courts.ms.gov/Images/Opinions/CO102109.pdf

Stanley R. Chesney v. State, No. 2013-KA-00207-COA (Miss.Ct.App. May 19, 2015)

CASE: Exploitation of a Child x5
SENTENCE: 40 years

COURT: Neshoba County Circuit Court
TRIAL JUDGE: Hon. Marcus D. Gordon

APPELLANT ATTORNEY: Hunter Nolan Aikens
APPELLEE ATTORNEY: Brad Alan Smith
DISTRICT ATTORNEY: Mark Sheldon Duncan

DISPOSITION: Reversed and Rendered. Barnes, J., for the Court. Lee, C.J., Griffis, P.J., Ishee, Roberts and Fair, JJ., Concur. James, J., Concurs in Part and in the Result Without Separate Written Opinion. Maxwell, J., Concurs in Part and Dissents in Part Without Separate Written Opinion. Carlton, J., Dissents with Separate Written Opinion. Irving, P.J., Dissents Without Separate Written Opinion.

ISSUES: (1) Whether the circuit court erred in failing to instruct the jury on the essential elements of the crime (venue); and (2) whether the circuit court erred in denying Chesney's motion to suppress the evidence obtained through the search warrant.

FACTS: On December 19, 2011, Philadelphia Police Chief Richard Sistrunk was provided information concerning a possible identify theft. An informant, John Paul Dove, implicated Stanley Chesney. Sistrunk obtained a search warrant for Chesney's residence to recover a computer "with information on Sherri Stewart on identity theft." When Sistrunk arrived, Chesney told him that his laptop was at Gator Computers, a nearby computer repair store. When the police went to execute the search warrant and recover the computer at Gator Computers, the clerk at the store, Matthew Kaulfers, alerted them to the presence of certain photographs in the computer's "recycle bin" that he suspected depicted children performing sexual acts, based on the names of the picture files. Chesney's computer was taken to the police department, and photographs were quickly discovered that possibly depicted child pornography. A second search warrant was obtained to look for child pornography. Five images depicting child pornography in the computer's recycle bin were recovered. Chesney was brought in for questioning and subsequently confessed to possessing the photographic files. At trial, defense counsel moved to suppress the evidence because the first search warrant for identity theft was not based on credible or reliable information. That motion, as well as a motion to suppress the conviction, were denied and Chesney was subsequently convicted.

HELD: (1) Although Chesney did not object to the indictment at trial, the failure to submit to the jury the essential elements of a crime amounts to plain error and can be raised on appeal for the first time.

Venue is an indispensable element of any criminal prosecution. The written jury instructions provided that the jury had to find the crime occurred "at the time and place charged" in each count. Nowhere was the jury instructed in open court that the location of the conduct was an element of the offense. While there was some proof of venue elicited during the trial, the jury was never instructed that it had to find that the crimes occurred in Neshoba County. This was reversal error.

(2) The affidavit for the original search warrant never described the information from the informant as being reliable or credible. At the hearing on the motion to suppress, Sistrunk admitted to defense counsel that he had never met or spoken with the informant prior to this incident. The threshold requirements for probable cause were not met.

Finding that the first search warrant was invalid for lack of probable cause, the COA went on to hold that the resulting evidence obtained through the first warrant – including evidence obtained through the second search warrant and Chesney's confession – should have been suppressed.

First, Chesney had standing to challenge the search and seizure of his computer files by police. The police issued an invalid search warrant, directing law enforcement to seize Chesney's personal computer from his home in order to look for evidence of identity theft. The police obtained the computer from the repair shop only under the purported authority of the invalid search warrant. The search of the computer files by the police prior to obtaining the second search warrant was a violation of Chesney's 4th Amendment rights. Chesney he had a reasonable expectation of privacy in the contents of the computer while it was waiting repair at Gator's.

Kaulfers's statement to police – that he had located files that appeared to be child pornography, was insufficient to constitute an independent source of probable cause outside the first warrant. The actual files with the pornography were found by a police technician prior to obtaining the second warrant. There is nothing to indicate Kaulfers would have independently come forward with the information regarding the photographs had police not come to seize the computer based on the first warrant. Kaulfer's comment did not "purge the taint" of the invalid first search warrant from the second warrant.

The COA also found the case did not fall under the good-faith exception or the inevitable-discovery doctrine to the exclusionary rule. Any reliance by the police on the underlying facts to support probable cause for the first warrant was "entirely unreasonable," so the good faith exception can not apply. There was no evidence that Kaulfers would have independently contacted and informed the police of the computer files, without the alleged authority of the first search warrant. "Thus, we find nothing to indicate the child pornography on Chesney's computer would inevitably have been discovered through constitutionally permissible means."

All evidence obtained as a result of the first and second warrants, including the photographs and Chesney's statement to police, was inadmissible under the "fruit of the poisonous tree." Accordingly, there is no legally sufficient evidence to support Chesney's convictions. The case was reversed and rendered.

Carlton, J., Dissenting:

Judge Carlton concurred that the case had to be reversed and remanded based on the failure to instruct on venue. Since that issue was dispositive, she believed the Court "should exercise restraint by refraining from comment on the remaining assignments of error since we have no power to issue advisory opinions for the retrial of this case."

To read the full opinion, click here:
http://courts.ms.gov/Images/Opinions/CO96532.pdf

May 26, 2015

Kimberly C. Sellers v. State, No. 2014-KM-00432-COA (Miss.Ct.App. May 26, 2015)

CASE: Misdemeanor: 1st offense DUI
SENTENCE: Fine of $600

COURT: Oktibbeha County Circuit Court
TRIAL JUDGE: Hon. Lee J. Howard

APPELLANT ATTORNEY: Charles Bruce Brown
APPELLEE ATTORNEY: Caroline Moore
CITY ATTORNEY: Roy E. Carpenter Jr.

DISPOSITION: Affirmed. Fair, J., for the Court. Lee, C.J., Irving and Griffis, P.JJ., Barnes, Ishee, Roberts, Maxwell and James, JJ., Concur. Carlton, J., Not Participating.

ISSUES: (1) Whether the evidence stemming from the stop should have been suppressed; (2) whether there was probable cause to order a breath test; and (3) whether the evidence was sufficient.

FACTS: Kimberly Sellers was convicted of a First Offense DUI after she was stopped at a driver's license checkpoint in Starkville. A subsequent Intoxilizer test showed her blood alcohol content to be .088%. Apparently, an officer directed her car to another location for further inspection. A different DUI officer testified that he immediately noticed the smell of an intoxicating beverage that was "emitting" from the vehicle, and that Sellers was wearing a paper bracelet like the ones required by local establishments that serve alcohol. Sellers failed three field sobriety tests. On appeal, Sellers did not challenge the initial stop at the checkpoint, but, rather, the apparent diversion and extended detention of her vehicle for further examination.

HELD: (1) Sellers failed to properly ratse this issue at trial, so the claim is barred. Once the prosecution presented the DUI officer, Sellers objected on the grounds of lack of probable cause to stop the vehicle. An investigatory stop requires only reasonable suspicion that the person has committed or is about to commit a crime. Because she failed to move to suppress the evidence, the exact circumstances surrounding the stop were not thoroughly explored at trial. The issue of the legality of the extended detention, assuming it occurred, was not properly preserved in the trial court. Regardless, the observations of the DUI officer "were in plain sight (or smell, as it were), and the circuit court could have reasonably inferred that the first officer had also observed them moments before, giving him reasonable suspicion to detain Sellers for further investigation."

(2) Sellers failed to support her other arguments with authority. Sellers argued that the officer lacked sufficient probable cause to demand that she take a breath test. The officer testified that Sellers had failed three field sobriety tests. Sellers incorrectly argued the horizontal gaze nystagmus test (HGN) is insufficient to show probable cause. However, the HGN test can still be used to prove probable cause to arrest and administer the Intoxilizer or blood text.

(3) The evidence was sufficient. The defense attempted to use an expert on retrograde extrapolation. The circuit court did not err in rejecting the retrograde extrapolation defense. The expert's testimony could have been rejected for multiple reasons, but the circuit court's most obvious reason was the expert's admission that he did not know the source of the data he based his testimony on, and the fact he received it from Seller's attorney. The expert did not independently verify the underlying data (how much she had to drink or how much she weighed).

To read the full opinion, click here:
http://courts.ms.gov/Images/Opinions/CO103405.pdf

Robert Silvia v. State, No. 2013-KA-01510-COA (Miss.Ct.App. May 26, 2015)

CASE: Murder
SENTENCE: Life

COURT: Walthall County Circuit Court
TRIAL JUDGE: Hon. David H. Strong Jr.

APPELLANT ATTORNEY: George T. Holmes, Phillip W. Broadhead
APPELLEE ATTORNEY: Barbara Wakeland Byrd
DISTRICT ATTORNEY: Dee Bates

DISPOSITION: Reversed and Remanded. Lee, C.J., for the Court. Irving and Griffis, P.JJ., Barnes, Ishee, Roberts, Maxwell, Fair and James, JJ., Concur. Carlton, J., Dissents with Separate Written Opinion.

ISSUE: Whether the trial court erred in failing to conduct a competency hearing.

FACTS: On June 10, 2010, Mandy Barthelot contacted the Walthall County Sheriff's Department regarding her mother, Darlene Barthelot. Robert Silvia, Darlene's boyfriend of 17 years, had not allowed Mandy to contact her. Deputy Billy Wayne Thornhill was sent to investigate. Neighbors testified they have not seen Darlene in several days. Gavin Fulkerson told Thornhill that Silvia had been upset crying about his recent separation from Darlene. Silvia had recently lost his job. Fulkerson testified that when Mandy told Silvia she was calling the police, Silvia left his house in a hurry. After knocking on the door and getting no response, Thornhill thought he heard a noise inside. Thronhill then contracted an investigator to get permission to enter the house. He found Darlene's body inside a large freezer in the kitchen. Thronhill obtained a search warrant after he found the body. When Silvia was stopped by police, he told an officer he had done something really bad and that he had lost his job and his wife was going to leave him, so he shot her. Silvia was intoxicated, so he was not interviewed until the next day. Silvia waived his *Miranda* rights then admitted that he shot Darlene.

At the trial, Silvia testified that he was sitting in the living room with Darlene, and the next thing he remembered, he was standing in the doorway holding a shotgun and Darlene was dead. Prior to trial, Silvia requested a mental examination. The State agreed, and the trial court ordered Dr. Beverly Smallwood to conduct a mental examination. An examination was conducted, but it appears there was no pretrial competency hearing. Silva was convicted and appealed.

HELD: Silvia contends that the trial court erred by failing to conduct a competency hearing. Although, Dr. Smallwood performed a mental examination, no pretrial competency hearing was conducted. URCCC Rule 9.06 requires a competency hearing once a trial court orders a psychiatric evaluation. The trial court attempted to schedule the competency hearing, but for reasons unclear in the record, the hearing never occurred. Accordingly, the case was reversed and remanded for a competency hearing. If Silvia is found competent to stand trial, he can be tried again.

Carlton, J., Dissenting:

Judge Carlton disagreed that the case must be reversed because no on-the-record competency hearing was held by the trial court. A review of the record fails to show any basis to support a bona fide reason for questioning Silva's mental competency or sanity. "Since the evidence before the trial court raised no bona fide doubt or reasonable question about Silvia's competency to stand trial, I respectfully submit that no constitutional or due-process violation occurred herein." Dr. Smallwood found Silvia was competent and ready to stand trial, and also determined that Silvia was sane at the time of the offense. The trial court and the defense received the report of the mental evaluation.

> To reverse Silvia's conviction for the failure of the trial court in this case to hold a competency hearing on the record, after documentation of receipt of the mental-evaluation report and a conscious choice by Silvia's counsel to not pursue such, opens the door to abuse of the judicial process.

To read the full opinion, click here:
http://courts.ms.gov/Images/Opinions/CO101826.pdf

June 2, 2015

Alphonzo Cortez Garth v. State, No. 2013-KA-00383-COA (Miss.Ct.App. June 2, 2015)

CASE: Possession of more than 30 grams of Cocaine
SENTENCE: 25 years, with 5 years PRS

COURT: Clay County Circuit Court
TRIAL JUDGE: Hon. Lee J. Howard

APPELLANT ATTORNEY: Rodney A. Ray
APPELLEE ATTORNEY: Laura Hogan Tedder
DISTRICT ATTORNEY: Forrest Allgood

DISPOSITION: Affirmed. Fair, J., for the Court. Lee, C.J., Irving and Griffis, P.JJ., Barnes, Ishee,

Roberts, Carlton, Maxwell and James, JJ., Concur.

ISSUE: Whether the trial judge erred in failing to suppress drugs found in defendant's vehicle based on an illegal search.

FACTS: Alphonozo Garth and another man were sitting in a vehicle outside some apartments in West Point, MS. Garth was in the driver's seat. Police were searching for the other man after a complaint that he had been involved in a disturbance at the apartments. The officers spoke to Garth, who provided ID to prove he was not the man they were looking for. Officers noticed that Garth had an open container of an alcoholic beverage between his legs. At this point, Garth exited the vehicle, hitting one of the officers with the door, and then attempted to strike the officer. During the tussle, Garth threw a clear plastic bag that contained something white, which was picked up by a bystander who escaped with it. Garth was arrested for assaulting the police officer and taken away from the scene. The officers found a large amount of cash in Garth's pockets – more than $400. A drug-sniffing dog "alerted" while walking past the driver's door of Garth's vehicle. The officer opened the door and found what was later determined to be 37 grams of cocaine in a pocket on the driver's door. The officers also found digital scales and an additional 2.7 grams of cocaine in the center console. When Garth was presented with a written notice that said his car was seized because of his possession of crack cocaine, Garth interjected to say the cocaine was powder, not crack – which turned out to be true.

HELD: Garth contends that the drugs were found in an illegal search incident to his arrest. However, this was not the basis for the search. It is clear that probable cause existed to search Garth's vehicle. Garth assaulted an officer in an apparent attempt to divert attention so an accomplice could carry away what appeared to be illegal drugs. Garth was carrying a large amount of cash, and a police dog alerted on the driver's door of the vehicle Garth had been occupying. These circumstances form a substantial basis for the trial court to have found probable cause for a legal warrantless search of the vehicle.

To read the full opinion, click here:
http://courts.ms.gov/Images/Opinions/CO103579.pdf

Keith Allen Davis, Sr. v. State, No. 2013-KA-01218-COA (Miss.Ct.App. June 2, 2015)

CASE: Murder
SENTENCE: Life

COURT: Clarke County Circuit Court
TRIAL JUDGE: Hon. Robert Walter Bailey

APPELLANT ATTORNEY: Benjamin Allen Suber
APPELLEE ATTORNEY: LaDonna C. Holland
DISTRICT ATTORNEY: Bilbo Mitchell

DISPOSITION: Affirmed. Carlton, J., for the Court. Lee, C.J., Irving and Griffis, P.JJ., Barnes, Ishee, Roberts, Maxwell, Fair and James, JJ., Concur.

ISSUES: (1) Whether there was sufficient evidence to support the jury's verdict, and (2) whether the jury's verdict is against the overwhelming weight of the evidence.

FACTS: When Keith Davis failed to pay his power bill, an employee from East Mississippi Electric Power Association (EMEPA) arrived at his home on Friday, June 22, 2012, to turn off the power. After asking for more time, EMEPA gave him until Monday. On the afternoon of Monday, June 25, 2012, Nathan Baker arrived at Davis's home to either collect the balance owed or to turn off the power. Davis asked Baker for more time to pay the bill and explained that his son had asthma and needed power to use his breathing pump. Following Baker's refusal to extend the payment deadline, Davis retrieved the gun he owned and shot and killed Baker. Davis then moved Baker's EMEPA truck a few miles down the road and hid Baker's body on grandparents' property. When Baker did not show up for work on Tuesday, EMEPA traced his truck and determined Davis was the last call he made the day before. After deputies spoke to Davis, a search warrant was obtained. Deputies found what appeared to be blood on the ground around Davis's power meter, as well as marks indicating signs of a struggle and of an object being dragged through the grass. Davis eventually admitted killing Baker and led deputies to his body. Baker sustained blunt-force injuries, including a fractured skull, and three gunshot wounds to his head, chest, and arm. Davis gave three different statements to police, all varying slightly in detail, but all admitting he planned to kill the EMEPA employee who tried to turn off his power.

HELD: (1) and (2) Davis asserted the evidence is insufficient because the State failed to prove beyond a reasonable doubt that he failed to act in necessary self-defense. Davis claimed that, at most, the evidence supports a manslaughter conviction rather than deliberate design murder conviction. The evidence to support Davis's conviction included Davis's own pretrial statements, corroborating evidence found at the crime scene, and testimony demonstrating that Davis possessed both a motive and an opportunity to kill Baker. Davis admitted he preplanned the murder. He told his wife he would not let them turn off the power and told his children to stay inside the house no matter what happened and to turn up the volume on their video game. He practiced shooting his gun over the weekend before Baker's arrival.

To read the full opinion, click here:
http://courts.ms.gov/Images/Opinions/CO103518.pdf

Antonio Cooper v. State, No. 2014-KA-00056-COA (Miss.Ct.App. June 2, 2015)

CASE: Aggravated Assault and Possession of a Firearm by a Convicted Felon
SENTENCE: 20 years as an habitual offender, plus a 10 year consecutive enhancement for use of a firearm during a felony for the aggravated assault, and a concurrent 10 years for the felon in possession

COURT: Bolivar County Circuit Court
TRIAL JUDGE: Hon. Albert B. Smith, III

APPELLANT ATTORNEY: Hunter Nolan Aikens
APPELLEE ATTORNEY: Melanie Dotson Thomas
DISTRICT ATTORNEY: Brenda Fay Mitchell

DISPOSITION: Affirmed in Part; Reversed and Rendered in Part. Barnes, J., for the Court. Lee, C.J., Irving and Griffis, P.JJ., Ishee, Roberts, Carlton, Maxwell, Fair and James, JJ., Concur.

ISSUE: Whether the trial court erred in imposing an additional 10 year enhancement to the 20 year habitual offender sentence for aggravated assault.

FACTS: On June 19, 2013, Antonio Cooper was driving a green Pontiac and approached a group of individuals having a cookout on Church Street in Cleveland, MS. Cooper rolled down the passenger-side window of the vehicle and shot into the crowd with a small chrome revolver. He struck the victim, Richard Brown, in the upper arm. Five eyewitnesses for the State, including the victim, identified Cooper as the shooter, and testified that Cooper had had a recent physical altercation with another person at the cookout, who was standing next to the victim at the time of the shooting. Cooper, testifying on his own behalf, offered alibi testimony that at the time of the shooting he was at his sister's house and did not shoot Brown, who was his best friend. The jury convicted him and sentenced him to 20 years as an habitual offender for the aggravated assault, and the court added an additional ten years under the firearm-enhancement statute, to run consecutively to the sentence for aggravated assault.

HELD: The State confessed error in the sentence. The enhancement statute (§97-37-37(2) for use of a firearm during a felony) applies "[e]xcept to the extent that a greater minimum sentence is otherwise provided." Cooper's mandatory 20-year sentence for aggravated assault as a habitual offender under §99-19-81 provides a "greater minimum sentence" than the 10-year enhancement statute. Therefore, §97-37-37(2) was inapplicable to this case. The trial court erred in imposing the additional ten-year sentence.

To read the full opinion, click here:
http://courts.ms.gov/Images/Opinions/CO103808.pdf

Robert Patrick Terrell v. State, No. 2014-KM-00785-COA (Miss.Ct.App. June 2, 2015)

CASE: Misdemeanor - Indirect Criminal Contempt
SENTENCE: 6 Months

COURT: Jefferson Davis County Circuit Court
TRIAL JUDGE: Hon. Anthony Alan Mozingo

APPELLANT ATTORNEY: J.M. Ritchey
APPELLEE ATTORNEY: Laura H. Tedder
DISTRICT ATTORNEY: Haldon Kittrell

DISPOSITION: Reversed and Remanded. Roberts, J., for the Court. Lee, C.J., Irving and Griffis, P.JJ., Barnes, Ishee, Carlton, Maxwell, Fair and James, JJ., Concur.

ISSUE: Whether the trial judge erred in failing to recuse himself from a constructive criminal contempt case.

FACTS: Robert Patrick Terrell was indicted in Jefferson Davis County on 20 separate fraud charges. On the day of trial, the court reporter was sick, so the court granted a one day continuance. The jury was dismissed and told to return the next day. Terrell was not present in the courtroom at the time the trial judge dismissed the jurors. Two DA investigators witnessed Terrell briefly speaking to two members of the jury in the parking lot. The next morning, one of the jurors who spoke to Terrell asked to be removed from the venire, as Terrell had called him that morning. During voir dire, the second juror admitted he knew Terrell, but denied having a conversation with Terrell. The DA investigators then testified, and the court issued an oral show cause order to Terrell to determine why he should not be held in contempt of court the following day. Terrell's attorney objected to having the hearing the following day, stating that Terrell was owed service of process under MRCP Rule 81, as well as noting the impracticality of preparation on such short notice. The objections were overruled and the jury was dismissed. At 4:00 p.m. that afternoon, the State electronically mailed a "Petition to Find Robert Patrick Terrell in Contempt of Court" to Terrell's attorney. The next morning, another request for a delay was denied, as well as a motion for the trial judge to recuse himself. After hearing testimony from the jurors, the clerk, and the investigators, Terrell was found guilty and his bond was revoked. He appealed.

HELD: Terrell argued that the trial judge should have recused himself from the contempt proceedings due to the judge's personal involvement in investigating and bringing the charges and due to his bias towards Terrell. There was some factual confusion as to who actually initiated the contempt proceedings against Terrell, the State or the court.

> While we cannot say with certainty whether the State's ore tenus motion or the trial judge's show-cause order are responsible for the contempt proceedings, at the very least, the situation is muddled enough to call the trial judge's involvement into question. Even assuming, arguendo, that the trial judge did not initiate the proceedings, his investigation into the contemptuous allegations, his interrogation of [the DA investigator], and his personal knowledge and involvement gave him substantial personal involvement in the prosecution.

Where a judge has initiated indirect contempt proceedings, particularly when a show-cause order has been issued, a judge must remove himself from the proceedings. The judge also used outside events to support his belief that Terrell had ill intentions, which he did not disclose to the parties. (Apparently, Terrell had secretly paid for the judge's lunch at a local restaurant, and the court knew that Terrell had tried to get a list of the jury venire prior to trial).

The trial judge also revoked Terrell's bail sua sponte, without any prompting or request from the State. "Regrettably, we must conclude that a reasonable person, knowing all of these circumstances, would clearly have a reasonable doubt about the trial judge's ability to be impartial."

To read the full opinion, click here:
http://courts.ms.gov/Images/Opinions/CO103819.pdf

June 9, 2015

Timothy Allen McCoy v. State, No. 2013-KA-02126-COA (Miss.Ct.App. June 9, 2015)

CASE: Sexual Battery x4 and one count of Exposure to HIV
SENTENCE: 30 years for Sexual Battery Count I, 25 years for Sexual Battery Count II, and 10 years for each remaining counts, all consecutively, but to run concurrently to the 10 years for Exposure to HIV in Count V.

COURT: Newton County Circuit Court
TRIAL JUDGE: Hon. Marcus D. Gordon

APPELLANT ATTORNEY: Justin Taylor Cook
APPELLEE ATTORNEY: Billy L. Gore
DISTRICT ATTORNEY: Mark Sheldon Duncan

DISPOSITION: Appeal Dismissed. Maxwell, J., for the Court. Lee, C.J., Irving and Griffis, P.JJ., Barnes, Ishee, Roberts, Carlton, Fair and James, JJ., Concur.

ISSUE: Whether McCoy's appeal was proper.

FACTS: On On April 8, 2013, Timothy Allen McCoy was convicted of four counts of sexual battery and one count of exposing another to human immunodeficiency virus (HIV). Seven days later, on April 18, 2013, McCoy filed a motion for a JNOV or, alternatively, a new trial. On September 23, 2013, he filed a motion requesting discovery, the trial transcript and court docket. The trial judge denied the motion, finding that no trial transcript existed. On December 17, 2013, McCoy filed a pro se notice of appeal and a request to proceed IFP. The trial court granted his motion to proceed IFP, and appointed the Office of Indigent Appeals to represent McCoy. Appellate counsel immediately filed an amended notice of appeal. The amended notice generically stated McCoy was appealing the "Judgment of Conviction, Sentencing Order and Order Overruling Motion for New Trial or JNOV entered in this action," without referencing any judgment or order by specific entry date. On appeal, McCoy challenged the length of his sentence, the sufficiency of the evidence, the effectiveness of his trial counsel, and the impartiality of the trial judge.

HELD: The COA could not reach the merits of his claims because it lacked appellate jurisdiction to consider McCoy's conviction and sentence. The circuit court has yet to enter an order denying McCoy's motion, so the thirty-day time period to file a notice of appeal has not even started. "The fact the motion for a new trial is still pending is no triviality or technicality." McCoy's notice of appeal is ineffective. The appeal was dismissed.

To read the full opinion, click here:
http://courts.ms.gov/Images/Opinions/CO103863.pdf

Anthony Windless (I) v. State, No. 2014-KA-01063-COA (Miss.Ct.App. June 9, 2015)

CASE: Identity Theft
SENTENCE: 2 years

COURT: Quitman County Circuit Court
TRIAL JUDGE: Hon. Johnnie E. Walls Jr.

APPELLANT ATTORNEY: George T. Holmes
APPELLEE ATTORNEY: Barbara Wakeland Byrd
DISTRICT ATTORNEY: Brenda Fay Mitchell

DISPOSITION: Affirmed. Maxwell, J., for the Court. Lee, C.J., Irving and Griffis, P.JJ., Barnes, Ishee, Roberts, Carlton, Fair and James, JJ., Concur.

ISSUE: *Lindsey* brief. Whether there were any arguable issues for appeal.

FACTS: In July 2012, Charles Province lost his wallet, which contained his driver's license and Social Security card. Three months later, AT&T contacted Province about a bill for several phone lines that had been opened in his name without his authority. Province also received a bill from Verizon for unauthorized wireless accounts. The invoice for the Verizon bill listed Anthony Windless's mother's address. The detective investigating the case approached Windless, who was in jail on another matter, and asked him about the phones. Windless waived his *Miranda* rights and admitted he had used Province's information to set up the phone accounts. At trial, Windless recanted. He claimed he only confessed to cover for his mother and sister. He was nevertheless convicted and appealed. Appellate counsel filed a *Lindsey* brief. Windless did not file a pro se brief.

HELD: Windless's attorney complied with *Lindsey's* requirements. "We too have reviewed the record and find no arguable issues that would require supplemental briefing. Our review shows Windless's conviction and sentence should be affirmed."

To read the full opinion, click here:
http://courts.ms.gov/Images/Opinions/CO103855.pdf

Donald Williams (Donald) v. State, No. 2013-KP-02064-COA (Miss.Ct.App. June 9, 2015)

CASE: Failure to Register as a Sex Offender
SENTENCE: Life without Parole as an habitual offender

COURT: Pearl River County Circuit Court
TRIAL JUDGE: Hon. Anthony Alan Mozingo

APPELLANT ATTORNEY: Donald Williams Jr. (Pro Se)
APPELLEE ATTORNEY: Lisa L. Blount

DISPOSITION: Affirmed. Carlton, J., for the Court. Lee, C.J., Irving and Griffis, P.JJ., Barnes, Ishee, Roberts, Maxwell and Fair, JJ., Concur. James, J., Concurs in Part Without Separate Written Opinion.

ISSUES: (1) Whether Williams's conviction for failing to register as a sex offender violates the prohibition against double jeopardy, and (2) whether he was denied the right to call a witness in his defense.

FACTS: Donald Williams was convicted of criminal sexual conduct, third degree in Minnesota in 1995. Williams moved to Mississippi and registered as a sex offender inForrest County on March 15, 2011, giving his address of a hotel in Hattiesburg. He re-registered on July 2, 2012, giving his residence address as America's Best Value Inn and Suites in Picayune. However, the facts show that Williams was living at the Clinton Inn Motel in Clinton. In September of 2012, Clinton police contacted the Pearl River County Sheriff's Office about Williams since he appeared to be living in Clinton. Williams was seen on the Mississippi College campus telling a student he was a professor looking for work. Williams re-registered as living at the America's Best Value Inn on September 28, 2012. The clerk at America's Best Value Inn told police Williams left on July 27, 2012. Williams was subsequently charged with failure to register as a sex offender because he failed to notify the DPS ten days prior to changing addresses. At trial, Williams represented himself, but did not testify. He argued to the court that that the Picayune police evicted him from the America's Best Value Inn. He alleged the police forced him to leave, telling him that he "shouldn't be living in Mississippi," and allegedly threatened his family. He called a taxi driver to testify he drove Williams and his family to Slidell on July 27, 2012. Williams was convicted and appealed.

HELD: (1) Williams contends that he was subjected to double jeopardy because he was previously charged with failure to register as a sex offender in 2009 in Marion County. He claimed he was acquitted. (Apparently it was nol pros'd). However, the record reflects that the State engaged in no double prosecution of the same offense and committed no double-jeopardy violation. His 2009 indictment arose out of separate and distinct facts and circumstances in Marion County.

(2) Williams claimed he was denied the basic fundamental right to call a witness at trial, namely Detective Chris Toast of the Picayune PD, who Williams claims was responsible for his eviction from the America's Best Value Inn. However, the record contains no proof of a request for Detective Toast. The trial judge did not abuse his discretion in the denial of Williams's attempt on the day of trial to broadly and ambiguously subpoena "all accompanying police officers, et cetera, who answer[ed] a call to [America's Best Value] hotel . . . that day, at that time, that year" of the alleged eviction in Picayune.

To read the full opinion, click here:
http://courts.ms.gov/Images/Opinions/CO103538.pdf

Donald Allen Caves v. State, No. 2014-KA-00643-COA (Miss.Ct.App. June 9, 2015)

CASE: Failure to Register as a Sex Offender
SENTENCE: Life without parole as an habitual offender

COURT: Pearl River County Circuit Court
TRIAL JUDGE: Hon. Anthony Alan Mozingo

APPELLANT ATTORNEY: Mollie Marie McMillin
APPELLEE ATTORNEY: Melanie Dotson Thomas
DISTRICT ATTORNEY: Haldon J. Kittrell

DISPOSITION: Affirmed. Carlton, J., for the Court. Lee, C.J., Irving and Griffis, P.JJ., Barnes,

Ishee, Roberts and Fair, JJ., Concur. Maxwell, J., Concurs in Part and in the Result Without Separate Written Opinion. James, J., Concurs in Part Without Separate Written Opinion.

ISSUES: (1) Whether the trial court erred in excluding the testimony of a defense witness, and (2) whether the verdict was against the over whelming weight of the evidence.

FACTS: On June 6, 2013, Donald Caves was indicted for sexual battery and failure to register as a sex offender. The failure to register case was tried first. Caves said he was forced to move because a DHS employee told him his residence was unsanitary. Caves was convicted in 1990 of touching of a child for lustful purposes. Caves testified he could not read or write and possessed no actual knowledge that he had a duty to appear at the DPS ten days before he planned to move. However, at trial Cave's former girlfriend testified he can read and write but he can only read on a high school level. In addition, she testified that she personally went through the registration paperwork with Caves, and she also read the forms to him. After the State rested, Caves tried to introduce a witness that would confirm he was unable to read and write. The court excluded the witness, ruling the his ability to read wasn't a pivotal issue in this case. A clerk in the sheriff's department, and the ex-girlfriend both testified they read the documents to him. Caves was convicted and appealed.

HELD: (1) The trial court did not err in excluding the testimony. Erica Fraught was a defense witness that would testify that Caves was not able to read or write, and that she had to read and explain things to him regularly. Caves claims that because of his inability to read the registration requirements he lacked the actual knowledge of his duty to appear in person ten days before he intended to move. The court excluded the testimony because Fraught's subjective knowledge of Caves is not a conclusive determination of what his reading abilities were. His ability to read or write provides no defense to compliance with the statutory requirement for sex offender registration. The testimony was irrelevant.

(2) The court found substantial evidence to support the verdict. Caves argued that due to his inability to read and his mental retardation, he did not understand he had to report to DPS. Whether the defendant had actual or probable knowledge of the duty to register is a factual issue for a jury to decide.

To read the full opinion, click here:
http://courts.ms.gov/Images/Opinions/CO103539.pdf

Preston Overton v. State, No. 2013-KA-01236-COA (Miss.Ct.App. June 9, 2015)

CASE: Possession of Cocaine and Possession of a Firearm by a Convicted Felon
SENTENCE: 15 years for the possession charge and a consecutive 10 years for the weapons charge

COURT: Adams County Circuit Court
TRIAL JUDGE: Hon. Forrest A. Johnson, Jr.

APPELLANT ATTORNEY: George T. Holmes
APPELLEE ATTORNEY: Billy L. Gore
DISTRICT ATTORNEY: Ronnie Lee Harper

DISPOSITION: Affirmed. Ishee, J., for the Court. Lee, C.J., and Carlton, J., Concur. Irving and Griffis, P.JJ., Roberts, Maxwell and Fair, JJ., Concur in Part and in the Result Without Separate Written Opinion. Barnes, J., Concurs in Result Only Without Separate Written Opinion. James, J., Concurs in Part Without Separate Written Opinion.

ISSUES: (1) Whether the circuit court erred in excluding two defense witnesses, and (2) whether Overton's trial attorney was constitutionally ineffective.

FACTS: On July 12,2012 Lieutenant George Pirkey and Deputy David Washington conducted a knock and talk at a house in Natchez after being informed that there were suspicious drug activities going on at the residence. The house belonged to Preston Overton who had inherited it from his grandmother in 2009. The officers claimed that Overton allowed them to enter. Overton admitted that he and his girlfriend had just finished smoking some marijuana in the house. Overton then signed consent to search form. Officers discovered cocaine and other materials such as a razor blade, a set of digital scales, and a 38 caliber revolver, all on the dresser in the room believed to be Overton's. Overton later signed a confession admitting the drugs were his. However, at trial, Overton claimed the officer entered without knocking, asking about the whereabouts of Jeremy Page. Overton claimed Page was renting a room from him, the room where the drugs and gun were found. He stated the gun had belonged to his grandmother and he did not know it was in the house. He also stated he signed the confession because police told him his girlfriend would be charged if he did not. Overton was convicted and appealed.

HELD: (1) On the evening before trial, the defense disclosed two witnesses (Overton's girlfriend and his aunt) to the State. The girlfriend planned to testify as an eyewitness of the events that occurred at Overton's home during the police officers' search, and Overton's aunt, planned to corroborate Overton's claim that Page was renting a room in Overton's house, and that the gun had belonged to Overton's grandmother. The State objected based on late discovery. The trial judge did not err in excluding the witnesses or denying a continuance. Overton admitted to signing the consent to search form and the confession. "We find that, in light of his confession and the length of time that the gun had been in his home, Overton was not prejudiced by the exclusion of the two defense witnesses."

(2) Overton also argued that there is a reasonable probability that, but for his trial counsel's neglect in timely disclosing to the defense witnesses, the jury would have reached a different result. However, the record does not affirmatively demonstrate that counsel was ineffective. Overton can raise the issue again in post-conviction.

To read the full opinion, click here:
http://courts.ms.gov/Images/Opinions/CO103453.pdf

June 16, 2015

Cedric Brown v. State, No. 2014-KA-00156-COA (Miss.Ct.App. June 16, 2015)

CASE: Burglary of a Dwelling and Simple Domestic Violence
SENTENCE: 15 years, followed by 5 years PRS for the burglary, and a concurrent 6 months for the domestic violence.

COURT: Bolivar County Circuit Court
TRIAL JUDGE: Hon. Albert B. Smith, III

APPELLANT ATTORNEY: Bolivar County Circuit Court
APPELLEE ATTORNEY: Justin Taylor Cook
DISTRICT ATTORNEY: Laura Hogan Tedder

DISPOSITION: Affirmed and Remanded. Roberts, J., for the Court. Lee, C.J., Irving and Griffis, P.JJ., Barnes, Ishee, Carlton, Maxwell, Fair and James, JJ., Concur.

ISSUE: *Lindsey* brief. Whether there were any arguable issues for appeal.

FACTS: On January 7, 2012, Cedric Brown kicked in the door of a former girlfriend's apartment to retrieve his clothes. Brown then struck her in the face, bloodying her nose and causing swelling. Brown was convicted by a jury and appealed. Brown's appellate counsel submitted a *Lindsey* brief explaining that he could not identify any appealable issues. Brown did not file a pro se brief.

HELD: The COA independently reviewed the record and concluded that there is no error regarding Brown's conviction. However, the Court did identify a serious clerical error in Brown's sentencing judgment. Although Brown's prior convictions were discussed at his sentencing, he was not indicted as an habitual offender. Even with no evidence of Brown's habitual-offender status presented, Brown's sentencing order clearly states that Brown was sentenced as a habitual offender pursuant to §99-19-81. Additionally, Brown's sentence for the misdemeanor domestic violence should have reflected that his imprisonment would be in the county jail and not under MDOC supervision. The case was remanded to correct these errors.

To read the full opinion, click here:
http://courts.ms.gov/Images/Opinions/CO104513.pdf

June 23, 2015

William Henderson v. State, No. 2013-KA-01782-COA (Miss.Ct.App. June 23, 2015)

CASE: Statutory Rape
SENTENCE: 30 years as an habitual offender

COURT: Yazoo County Circuit Court
TRIAL JUDGE: Hon. Jannie M. Lewis

APPELLANT ATTORNEY: Justin Taylor Cook
APPELLEE ATTORNEY: Melanie Dotson Thomas
DISTRICT ATTORNEY: Akillie Malone Oliver

DISPOSITION: Affirmed. Fair, J., for the Court. Lee, C.J., Irving and Griffis, P.JJ., Barnes, Ishee, Roberts, Carlton, Maxwell and James, JJ., Concur.

ISSUES: (1) Whether the trial court erred in admitting a letter allegedly written by Henderson, (2) whether the trial judge erred in failing to dismiss a sleepy juror, (3) whether the trial court erred in admitting a police audio statement of the victim, and (4) whether there was sufficient evidence to sentence him as an habitual offender.

FACTS: William Henderson was convicted of the statutory rape of his 13-year-old cousin, Abby. She testified that Henderson had repeatedly displayed a pistol to intimidate her into having sex with him. After their final encounter was interrupted, Henderson literally jumped out the window of the victim's bedroom, leaving behind some of his clothes and a condom wrapper bearing his fingerprint. He was convicted and appealed.

HELD: (1) Henderson claimed the court erred in admitting a handwritten letter given by Henderson to a jailmate to be delivered to a friend Henderson had visited the day of his final sexual encounter with Abby. In the letter, Henderson asked the friend to testify in his defense and corroborate his account that he had left the friend's residence with a girlfriend, and to say nothing about a gun. Although there was no handwriting analysis, the prosecution never claimed to authenticate the letter by way of handwriting, contending instead that it was authenticated by the chain of custody and by its subject matter. Henderson claimed that was insufficient, but raising an issue on appeal requires more than the announcement of a position, and the failure to affirmatively demonstrate error waives the issue on appeal.

(2) Henderson next argues that the trial court erred in not sua sponte dismissing a juror Henderson alleges was sleeping during the trial. The judge had to call out the juror a couple of times to make sure he was awake. Henderson never objected, interjected, or otherwise expressed any concern about the juror in question during the trial. Without a timely request from Henderson, the trial court was under no obligation to remove the juror suspected of sleeping.

(3) Henderson claimed the court erred in admitting a hearsay audio recording of the victim. However, the audio was admitted as a prior consistent statement to rebut a claim of recent fabrication by the victim that Henderson used a gun to intimidate her. Prior consistent statements are not hearsay under MRE 801(d)(1)(B).

(4) Henderson failed to acknowledge that there is extensive documentation of his prior offenses in the record – the documents were just accepted into evidence prior to the sentencing hearing. While the admission of the evidence prior to the sentencing hearing is irregular, it is not reversible error.

To read the full opinion, click here:
http://courts.ms.gov/Images/Opinions/CO104298.pdf

Houston Lee Jones v. State, No. 2014-KA-00319-COA (Miss.Ct.App. June 23, 2015)

CASE: Deliberate Design Murder
SENTENCE: Life

COURT: Jackson County Circuit Court
TRIAL JUDGE: Hon. Robert P. Krebs

APPELLANT ATTORNEY: George T. Holmes
APPELLEE ATTORNEY: Ladonna C. Holland
DISTRICT ATTORNEY: Anthony N. Lawrence, III

DISPOSITION: Affirmed. Ishee, J., for the Court. Lee, C.J., Irving, P.J., Barnes, Roberts, Carlton, Fair and James, JJ., Concur. Maxwell, J., Concurs in Part and in the Result Without Separate Written Opinion. Griffis, P.J., Concurs in Result Only Without Separate Written Opinion.

ISSUES: (1) Whether the jury was improperly instructed on deliberate-design murder; (2) whether Jones was prejudiced by hearsay testimony; (3) whether the circuit court erred in excluding one of Jones's statements to the police; and (4) whether the weight and sufficiency of the evidence did not adequately support the conviction.

FACTS: Houston Jones was living with his 64-year old step-grandfather Leo Landrum. On May 25, 2011, Jones shot and killed Landrum. Landrum had been financially helping Jones throughout his life. Jones, 18, had just become a father, so Landrum also began supporting his daughter. Landrum's finances were becoming strained. The day before Landrum was murdered, he told his sister-in-law that Jones had maxed out all of his credit cards, and that he was going to have to stop supporting Jones. He told a neighbor the same thing on the morning he was killed. Jones got some friends to take him by his house that evening, and asked them to come inside the back door since the front door was locked. When Landrum's body was discovered, police were called. Jones told police he did not know anything about it. Two days later, Jones confessed to killing Landrum after confronting him about Landrum's alleged sexual abuse of Jones when he was younger, as well as Landrum's suspected abuse of Jones's new daughter. He later gave police a more detailed statement of the alleged abuse. The jury was instructed on manslaughter, but found Jones guilty of murder.

HELD: (1) Jones first asserts that the jury was improperly instructed by the circuit court on deliberate-design murder. However, he failed to object to the instruction at trial, so the issue is waived on appeal.

(2) Jones next argues that the statements made by Landrum to his sister-in-law and to his neighbor regarding his intent to stop supporting Jones financially, were inadmissible hearsay. He also claimed this was impermissible "bad character" evidence. Landrum's statements were introduced to show his intent to cease financial support of Jones and therefore showed Landrum's state of mind. Landrum's discussions with a family member and a neighbor on the eve and morning of his death regarding his intent to stop financing his soon-to-be killer were relevant to show an alternative motive for Jones to have killed Landrum aside from the allegations of abuse. Regardless, the Rule 404(a) claim was not raised at trial and is barred on appeal. The statements presented to the jury only sought to establish Landrum's intent to stop financially supporting Jones, not to prove that Jones failed to support himself and his family financially.

(3) Just hours after Landrum's body was discovered, Jones denied any knowledge of or involvement in Landrum's murder. Two days later, Jones admitted that he had shot and killed Landrum, purportedly because of Landrum's past sexual abuse of Jones and possible new abuse of Jones's daughter. Jones asserted that he confronted Landrum, Landrum ignored him, so he shot and killed him. A subsequent statement gave more details of Landrum's alleged abuse. The trial judge did not

err in refusing to admit the last statement as it was cumulative and self-serving. Additionally, even if error, it was harmless. The statement contradicted some of Jones's trial testimony.

(4) The trial judge did not err in failing to grant a directed verdict under *Weathersby*. Jones argued that he was entitled to a directed verdict since he was the only eyewitness to the crime and his story was not substantially contradicted. "Since Jones admitted that he shot and killed Landrum, only murder and manslaughter were possible convictions. Hence, the *Weathersby* rule was not available for invocation."

The evidence was sufficient and the verdict was not against the weight of the evidence. The jury was privy to substantial witness testimony, including Jones's own testimony, and physical evidence regarding Landrum's financial condition, Jones's allegations of abuse, and the events leading up to, during, and after Landrum's murder. While Jones's defense of alleged abuse differs from the State's theory that his motive was financial, it was within the province of the jury to determine which story they believed and, thus, whether a deliberate-design murder or heat-of-passion manslaughter conviction was proper.

To read the full opinion, click here:
http://courts.ms.gov/Images/Opinions/CO102462.pdf

Joseph Snow Schrotz v. State, No. 2014-KA-00772-COA (Miss.Ct.App. June 23, 2015)

CASE: Felony Failure to Stop a Motor Vehicle and Trespass
SENTENCE: 5 years as an habitual offender, with a consecutive 6 months in the county jail for the trespass

COURT: Harrison County Circuit Court
TRIAL JUDGE: Hon. Roger T. Clark

APPELLANT ATTORNEY: George T. Holmes, Phillip Broadhead
APPELLEE ATTORNEY: Jeffrey A. Klingfuss
DISTRICT ATTORNEY: Joel Smith

DISPOSITION: Affirmed. Lee, C.J., for the Court. Irving and Griffis, P.JJ., Barnes, Ishee, Roberts, Carlton, Maxwell, Fair and James, JJ., Concur.

ISSUE: Whether appellant received ineffective assistance when counsel stipulated he was driving the car police were chasing.

FACTS: On May 27, 2013, a Harrison County sheriff's deputy was patrolling I-10 when he noticed the Dodge Caliber which had been reported stolen. He attempted to stop the vehicle and when the driver refused to stop, a high speed chase ensued. When the driver saw a roadblock, he jumped out and ran into the woods. Deputies gave a description of the driver and stopped pursuit. After finding stolen weapons in the car, authorities began a manhunt in the area. The following morning, a resident notified deputies that his home's silent alarm had been triggered. While checking the house, Joseph Schrotz was found inside. Deputies recovered a spare key to a car belonging to the owner's wife in

Schrotz's pocket. Schrotz was subsequently charged with receiving stolen property, felony failure to stop a motor vehicle, possession of stolen firearms, and burglary of a dwelling. The prosecution elected to try the felony failure to stop and burglary charges. Defense counsel was able to suppress the evidence related to the other charges. Counsel entered a stipulation that Schrotz had been driving the car, but argued it was a misdemeanor failure to stop, and also argued Schrotz was simply hiding in the house and did not intend to steal anything. Schrotz was convicted of felony failure to stop, but the jury found him guilty of trespass, not burglary. He appealed.

HELD: Schrotz argued that counsel were ineffective because they failed to object to the wording of the stipulations that placed him behind the wheel of the car attempting to evade police, amounting to the functional equivalent of a guilty plea. However, it appears to be reasonable trial strategy to admit guilt to misdemeanor failure to stop in an attempt to avoid conviction on the burglary of a dwelling charge. Although the State had to prove the person found in house was the driver of the vehicle they chased, they had fingerprint evidence to do so.

The maximum sentence for felony failure to stop a motor vehicle is 5 years, while the maximum sentence for burglary of a dwelling is 25 years. Schrotz was an habitual offender. Counsel's actions were not ineffective.

> ...[D]efense counsel conceded the identity of the driver to win favor with the jury in the hopes that such a concession would lend credence to Schrotz's assertion that he was not in Smith's home to steal, but was hiding from the manhunt that was underway. The trial strategy worked. Schrotz was found guilty of felony failure to stop a motor vehicle and trespass. Instead of being sentenced to twenty-five years for burglary of a dwelling, he received the maximum sentence for the crime of trespass, which is six months.

To read the full opinion, click here:
http://courts.ms.gov/Images/Opinions/CO104459.pdf

June 30, 2015

Richard White a/k/a Toney Buck v. State, No. 2013-KA-02132-COA (Miss.Ct.App. June 30, 2015)

CASE: Burglary of a Dwelling
SENTENCE: 25 years

COURT: Quitman County Circuit Court
TRIAL JUDGE: Hon. Albert B. Smith, III

APPELLANT ATTORNEY: Erin Elizabeth Pridgen
APPELLEE ATTORNEY: Jeffrey A. Klingfuss
DISTRICT ATTORNEY: Brenda Fay Mitchell

DISPOSITION: Affirmed. Roberts, J., for the Court. Lee, C.J., Griffis, P.J., Carlton, Maxwell and James, JJ., Concur. Fair, J., Dissents with Separate Written Opinion, Joined by Irving, P.J., Barnes

and Ishee, JJ.

ISSUE: Whether the circuit court committed plain error when it did not sua sponte instruct the jury on the elements of larceny and/or assault – the underlying intended crimes that the indictment listed for the burglary charge.

FACTS: On January 29, 2012, Newell Inman and his wife Johanna were returning home after visiting a sick friend. As they pulled into their driveway they noticed the light was in one of their storage rooms. Johanna went to turn off the light, and actually turned it back on and noticed an intruder. Johanna screamed for Newell, which lead to the two fighting and Newell getting hit in the head something metal which also broke his arm. Richard White was later identified as the intruder. They recognized him from a photograph that was presented by law enforcement. Newell had seen him around town, but did not know his name. White's fingerprint was also found on a box in the storage room. Newell was missing some tools, so White was charged with aggravated assault and burglary of the dwelling with the intent to "commit the crime of larceny and/or assault." At trial, White claimed alibi, but did not call any witnesses. He was convicted of burglary, but acquitted of the aggravated assault. For the first time on appeal, White argued that the circuit court should have sua sponte instructed the jury on the elements of larceny and/or assault.

HELD: A circuit court commits plain error if it does not instruct the jury on the essential elements of the crime. Although a court should, White cites no authority stating that reversible error is the unavoidable result when a circuit court does not unequivocally instruct a jury on the elements of the intended crime in a burglary trial. In *Conner v. State*, 138 So. 3d 143 (Miss. 2014), the SCT held that although the circuit court did not instruct the jury on the underlying intended crime for the burglary, the instructions as a whole adequately instructed the jury that it was required to find that the defendant "broke and entered the victim's dwelling with the intent to steal."

The jury could have found that when White saw the Inmans' vehicle approaching the carport, he went inside the storage room to arm himself to commit an assault in case he was discovered. The fact he was acquitted of aggravated assault is irrelevant. The jury could have also found White most likely intended to steal the Inmans' personal property. The evidence certainly supports that conclusion, since some of Newell's tools were missing. There was no manifest miscarriage of justice because the circuit court did not sua sponte instruct the jury regarding the specific elements of larceny.

Fair, J., Dissenting:

Judge Fair dissented, finding the jury instructions in this case did not "fully and fairly inform the jury of the intent requirement for burglary," in conformity with *Conner*. White's jury instructions did not list the elements of the underlying crimes of larceny or assault. Although neither party submitted elements instructions on the underlying crimes, the circuit court is responsible for assuring that the jury is fully and properly instructed on all issues of law relevant to the case. He would reverse and remand.

To read the full opinion, click here:
http://courts.ms.gov/Images/Opinions/CO105278.pdf

July 21, 2015

Corey Gray v. State, No. 2014-KA-00287-COA (Miss.Ct.App. July 21, 2015)

CASE: Grand Larceny
SENTENCE: 10 years

COURT: Jasper County Circuit Court
TRIAL JUDGE: Hon. Eddie H. Bowen

APPELLANT ATTORNEY: Benjamin Allen Suber
APPELLEE ATTORNEY: Scott Stuart
DISTRICT ATTORNEY: Daniel Christopher Jones

DISPOSITION: Affirmed. Carlton, J., for the Court. Lee, C.J., Irving and Griffis, P.JJ., Barnes, Ishee, Maxwell, Fair and James, JJ., Concur. Wilson, J., Not Participating.

ISSUE: Whether the evidence was sufficient to prove grand larceny.

FACTS: On May 14, 2012, Lillian Stevens was returning home from work, when she passed a truck in the road pulling a boat that she believed to be hers. She slammed on her brakes and turned around. The driver of the truck, Raymond Johnson, testified he saw Stevens turn around and pulled over to see what she wanted. Stevens asked the driver, "Where are you going with my boat?" Johnson immediately started arguing with his passenger, Corey Gray. Gray insisted to Stevens he had purchased the truck, but had no bill of sale. He eventually fled when the sheriff was called. Gray was charged with grand larceny. (The statute at the time required proof of over $500). Stevens testified she purchased the boat 14 years before for $4,500, and gave a low estimate of its current worth at $950, and for $200 for the trailer. Gary did not show up for his trial, and was tried and convicted in absentia.

HELD: Gray asserts that the State only offered proof of the market value of the used boat through the victim; and he argues that no other evidence was presented to prove the market value at the time of the theft. Gray claimed that without testimony regarding the general rate of depreciation for boats, the jury was left to determine whether a boat could depreciate from $4,500 to less than $500 in 14 years' time, with no evidence to guide its decision.

The jury heard Stevens's testimony regarding the purchase price of the boat and trailer, as well as her testimony that the boat and trailer were in working condition at the time they were stolen. The State also admitted into evidence a picture of Stevens's boat and trailer. The record reflects sufficient evidence exists from which the jury could find beyond a reasonable doubt the essential elements of the charged offense of grand larceny.

To read the full opinion, click here:
http://courts.ms.gov/Images/Opinions/CO104697.pdf

July 28, 2015

Marc Lewis v. State, No. 2014-KA-00186-COA (Miss.Ct.App. July 28, 2015)

CASE: Murder
SENTENCE: Life

COURT: Hinds County Circuit Court
TRIAL JUDGE: Hon. Jeff Weill, Sr.

APPELLANT ATTORNEY: George T. Holmes
APPELLEE ATTORNEY: Barbara Wakeland Byrd
DISTRICT ATTORNEY: Robert Shuler Smith

DISPOSITION: Affirmed. Ishee, J., for the Court. Lee, C.J., Irving and Griffis, P.JJ., Barnes, Carlton, Maxwell and Fair, JJ., Concur. James, J., Concurs in Part and Dissents in Part Without Separate Written Opinion. Wilson, J., Not Participating.

ISSUES: (1) Whether the circuit court erred in excluding lay-witness testimony regarding Lewis's mental health; (2) whether the circuit court denied Lewis the right to make a record for appellate review; and (3) whether the weight of the evidence supports a murder conviction.

FACTS: On April 15, 2011, Marc Lewis shot and killed his mother, Sharmeise Church. Lewis, his grandfather, Bobby Lewis, his sister, Aereal, and her infant daughter all lived in the house. Bobby testified that he had been asleep in his bedroom when he heard a gunshot and ran into the hall. He found Church telling him to call 911 because "this boy" had shot her. Aereal called 911, and Bobby found Lewis under the carport. Lewis denied he did anything and alleged Church was "faking." Bobby testified that Lewis had a gun, and he was "out of it." He was able to grab the gun out of Lewis's pocket when he was distracted. Aereal testified that she was in her room when she heard her mother on the phone with police describing a situation with Lewis. Church hung up the phone, and then Aereal heard a gunshot followed immediately by Church yelling in the hall that "Marc shot [her]." Aereal testified that Lewis had been drinking vodka with her boyfriend, Michael Boykins, in the hours leading up to the shooting. Boykins left shortly before the shooting. Boykins testified that he and Lewis purchased a liter of Taaka vodka and each took one Ecstasy pill. Lewis testified that he and Boykins were arguing and woke Church up, and she told him to go outside. According to Lewis, it was at that point when his gun went off accidentally and hit Church. Lewis stated that he loved his mother and never meant to shoot her. Instructed on murder and manslaughter, the jury found Lewis guilty of murder. He appealed.

HELD: (1) Lewis did not assert an insanity or diminished-capacity defense, but instead sought the lesser-included offense of culpable-negligence manslaughter. The defense argued that Lewis has a history of mental illness, and that testimony regarding such was necessary in order to prove Lewis's theory of manslaughter. The circuit court did not err in granting the State's motion in limine to prevent admission of Lewis's mental history. Because Lewis was asserting a defense of manslaughter, his state of mind was not at issue. Lewis was found competent to stand trial. Lewis's mental history was irrelevant in his pursuit of a manslaughter conviction rather than a murder conviction.

Bobby's testimony that Lewis was "out of it," did not open the door to this testimony. The trial judge found that the State had not opened the door because Bobby's statement was not in response to a question. Furthermore, the judge ruled that it did not matter if the defense questioned Bobby, because if Bobby testified that Lewis was intoxicated, intoxication is not a defense, and if it was "related to [Lewis] being crazy or out of his mind," it was not relevant.

(2) Prior to the trial, the defense moved ore tenus to stop the trial from moving forward and asked that Lewis be offered a plea bargain for the crime of manslaughter. The defense wanted to make a record by admitting a letter signed by several family members relating they did not want Lewis tried because of his mental issues. The trial judge did not err in finding the letter a victim impact statement appropriate at sentencing. The defense could have, but did not, submit the letter at sentencing.

(3) The evidence was sufficient to support murder. Lewis admitted that he shot Church, but he argued that it was an accident. He asked that the Court render a manslaughter conviction based on the fact that there was no evidence of malice. The State put forth evidence that Lewis, while under the effects of alcohol and Ecstasy, shot a gun while arguing with his mother and killed her. There was ample evidence to support that Lewis acted in a manner "eminently dangerous to others and evincing a depraved heart," when he shot and killed Church.

To read the full opinion, click here:
http://courts.ms.gov/Images/Opinions/CO103661.pdf

August 4, 2015

Lorenzo Miezao Murrill v. State, No. 2013-KA-01607-COA (Miss.Ct.App. August 4, 2015)

CASE: Armed Robbery
SENTENCE: 10 years, with 5 suspended, to run consecutively to any sentences previously imposed, followed by 5 years probation

COURT: Coahoma County Circuit Court
TRIAL JUDGE: Hon. Albert B. Smith, III

APPELLANT ATTORNEY: Benjamin Allen Suber
APPELLEE ATTORNEY: Lisa L. Blount
DISTRICT ATTORNEY: Brenda Fay Mitchell

DISPOSITION: Affirmed. Maxwell, J., for the Court. Lee, C.J., Griffis, P.J., Barnes, Ishee, Carlton, Fair and James, JJ., Concur. Irving, P.J., Dissents Without Separate Written Opinion. Wilson, J., Not Participating.

ISSUE: Whether the verdict was against the weight of the evidence.

FACTS: On May 29, 2012, Keith Redmond was delivery driver for Domino's Pizza. Redmond took an order to a residence in Clarksdale, MS. Lorenzo Miezao Murrill answered the door. Remond told him the order was $49.50, and Murrill asked Redmond to wait while his friend (Rico Riley) was

getting the money. The two appeared to be stalling. Riley then came to the door and said, "man, you could go on . . . and let us get the pizza, man." Redmond told him he needed the money to take to the store. At that point, Murrill and Redmond started "tussling with the bag a little bit." And before Redmond knew it, Riley pointed a gun at his head. Redmond immediately let go of the pizza and left. He reported the robbery to his boss, who called the police. Redmond returned to the scene while officers investigated. Redmond identified Riley from a six-picture lineup as the one who pointed the gun at him. Murrill and Riley were both charged with the armed robbery. Riley pled guilty, while Murrill was convicted by a jury and appealed.

HELD: Redmond's trial testimony was clear that Riley was the gunman and Murrill stole the pizza from him. Although the police report did not mention Murrill, Redmond clarified at trial that Murrill was the person who stole the food from him. In a pretrial audio statement Redmond suggested the gunman (Riley) was alone at the door. However, Redmond later explained at trial that Murrill "grabbed" the pizza and Riley was the gunman at least three times. "Here, the jury found Redmond's trial testimony—that Murrill was involved in the robbery—was credible."

To read the full opinion, click here:
http://courts.ms.gov/Images/Opinions/CO104668.pdf

Frederick Devon Pritchett v. State, No. 2014-KA-00288-COA (Miss.Ct.App. August 4, 2015)

CASE: Aggravated Assault on a LEO and Robbery
SENTENCE: 45 years as an habitual offender.

COURT: Lauderdale County Circuit Court
TRIAL JUDGE: Hon. Lester F. Williamson, Jr.

APPELLANT ATTORNEY: Hunter Nolan Aikens
APPELLEE ATTORNEY: Barbara Wakeland Byrd
DISTRICT ATTORNEY: Bilbo Mitchell

DISPOSITION: Affirmed. Barnes, J., for the Court. Irving and Griffis, P.JJ., Ishee, Carlton, Maxwell, Fair and Wilson, JJ., Concur. James, J., Concurs in Part Without Separate Written Opinion. Lee, C.J., Not Participating.

ISSUES: Whether the verdicts were against the weight of the evidence.

FACTS: On December 20, 2012, Frederick Pritchett, an inmate at the Lauderdale County Correctional Facility, was being held temporarily in a booking cell for medical observation, as he had complained of chest pain earlier that day. Penny McCracken, a correctional officer employed by the Sheriff's Department, was on duty. Pritchett requested a cup of water from McCracken, but when she opened the cell door, Pritchett grabbed McCracken's arm and attempted to pull her into the cell. The two struggled. Pritchett got McCracken in a choke hold. McCracken managed to escape Pritchett's hold and ran to the booking desk to call for assistance. Pritchett was able to take her cell phone when she was yelling for help. By the time the other officers responded to the call, Pritchett had backed away from McCracken and denying doing anything. The entire incident was recorded by surveillance

video. McCracken's cellphone was later found in Pritchett's cell under a mattress. McCracken, who was treated at a nearby hospital, suffered bleeding, bruising, and a black eye. McCracken appealed his conviction.

HELD: Pritchett claimed there was insufficient evidence that he attempted to cause serious bodily injury to McCracken, and that he was guilty of, at most, simple assault on a LEO. The surveillance video showed that Pritchett grabbed McCracken, threw her around, and choked her. She was screaming, "Please, no!" in obvious fear for her life. She testified that she thought Pritchett was going to drag her into the cell, rape her, and kill her. Another officer testified that later that evening, Pritchett told him "he tried to kill that b*tch." The evidence was sufficient for aggravated assault.

Pritchett also claimed the evidence failed to establish his specific intent in assaulting McCracken was to gain possession of her cell phone. The video showed Pritchett took the cell phone while McCracken was screaming for help. The evidence clearly established that Pritchett intended to deprive McCracken of her cell phone and that McCracken was in fear for her life when Pritchett took her phone. The fact McCracken did not know the cell phone was missing until after the danger had passed is of no consequence.

To read the full opinion, click here:
http://courts.ms.gov/Images/Opinions/CO105066.pdf

Elbert Davis v. State, No. 2014-KA-00113-COA (Miss.Ct.App. August 4, 2015)

CASE: Sexual Battery
SENTENCE: 22 years and 6 months

COURT: Washington County Circuit Court
TRIAL JUDGE: Hon. W. Ashley Hines

APPELLANT ATTORNEY: Hunter Nolan Aikens
APPELLEE ATTORNEY: LaDonna C. Holland
DISTRICT ATTORNEY: Willie Dewayne Richardson

DISPOSITION: Affirmed. Griffis, P.J., for the Court. Lee, C.J., Barnes, Ishee, Carlton, Maxwell, Fair and James, JJ., Concur. Irving, P.J., Concurs in Part and in the Result Without Separate Written Opinion. Wilson, J., Not Participating.

ISSUES: (1) Whether the trial court limited the right of Davis to show his confession was involuntary; (2) whether the trial court allowed impermissible hearsay; and (3) whether the trial court gave an improper instruction regarding the unsupported testimony of a sex-crime victim.

FACTS: In January 2013, ten-year-old Victoria lived with her grandmother in Greenville, MS, along with 44-year-old family member Elbert Lee Davis. On January 25, 2013, Victoria was watching television with her two cousins. Davis entered the room and asked Victoria to come to a back room to iron his clothes. After about ten minutes passed, one of the cousins went to check on Victoria. The door was locked, and the cousin knocked repeatedly on the door. When it opened she saw Victoria

on the bed pulling up her underwear and saw Davis behind the door pulling up his underwear. Victoria told her what happened after Davis left, and the cousin told her mother. The police were then contacted, and Victoria was also taken to the emergency room the same evening for evaluation. Davis was arrested the next day and confessed to having sex with Victoria. Davis was convicted and appealed.

HELD: (1) After the trial judge ruled Davis's statement was admissible, the State subsequently filed a motion in limine to prevent the defense from arguing the confession was involuntary to the jury. The trial judge ruled he could not grant that as to the defendant's state of mind, but would not allow the defense to ask the detective if he coerced a statement. However, the judge stated he would have to hear the question first. The defense did not bring the issue up again.

Davis claimed this ruling violated his fundamental right to present a defense. The trial court's ruling did not prohibit the introduction evidence that Davis was afraid. The trial judge did not indicate that Davis could not testify about any alleged coercion. Counsel's failure to raise the issue again at the appropriate time and obtain a ruling constitutes a waiver of the issue on appeal.

(2) During the State's direct examination of a detective, he was asked and allowed to testify that the nurse at the hospital told him that there was penetration of Victoria's vagina. Davis argues that this testimony was inadmissible hearsay. The State responded to the objection and claimed that the statement was not being offered for the truth of the matter asserted, but to show why Davis was charged. The trial court agreed and overruled the objection. The trial court did not abuse its discretion in allowing the testimony. The defense only objected to hearsay and did not object under MRE 403 that the probative value was outweighed by the prejudicial effect.

(3) Finally, Davis argued that the trial court erred in giving jury instruction S-8, which told the jury that the unsupported testimony of a sex-crime victim is sufficient if that testimony is not discredited or contradicted by other credible evidence. Davis did not object to the instruction at trial. The claim is barred and is not plain error. Regardless, the disputed jury instruction fairly stated the law of the case.

To read the full opinion, click here:
http://courts.ms.gov/Images/Opinions/CO104555.pdf

August 11, 2015

Shannon Rayner v. State, No. 2013-KA-01744-COA (Miss.Ct.App. August 11, 2015)

CASE: Deliberate Design Murder
SENTENCE: Life

COURT: Jasper County Circuit Court
TRIAL JUDGE: Hon. Eddie H. Bowen

APPELLANT ATTORNEY: John M. Colette, Sherwood Alexander Colette
APPELLEE ATTORNEY: Lisa L. Blount

DISTRICT ATTORNEY: Daniel Christopher Jones

DISPOSITION: Affirmed. Carlton, J., for the Court. Irving and Griffis, P.JJ., Barnes, Ishee, Maxwell, Fair and Wilson, JJ., Concur. James, J., Concurs in Part Without Separate Written Opinion. Lee, C.J., Not Participating.

ISSUES: (1) Whether the trial court erred in denying his motion for a judgment of acquittal; (2) whether the trial court erred in denying his JNOV motion; (3) whether the trial court erred in denying his motion for a mistrial; and (4) whether he was denied his Sixth Amendment right to a fair and impartial trial due to the prosecutor's allegedly improper and prejudicial remarks regarding the credibility of expert witness Dr. Steven Hayne.

FACTS: Shannon Rayner was convicted of murdering his wife, Sonya Hunt Rayner. (He was acquitted of a separate arson charge.) On February 14, 2011, the Rayner's went to a Ridgeland BankPlus and tried to take Sonya's name off their joint account. Rayner seemed agitated, telling Sonya, "this is what you wanted." The teller testified that Sonya seemed nervous, and she witnessed a heated argument between them in the parking lot. Rayner stated he and Sonya then decided to travel from Jackson down to his deer camp located in Bay Springs for a night. They went to Laurel to eat and to purchased some alcohol. After watching a movie, they fell asleep. Sometime during the night, Rayner claimed he woke up to find Sonya standing naked at the foot of the bed and "physically struggling with something." Rayner realized the bedroom was filled with smoke. He attempted to stand up, but testified that he was knocked to his hands and knees by the smoke, so he crawled toward the bedroom door. He woke up in the yard naked, with his right shoulder and ribs burning. He could not find Sonya. When firemen arrived, they dragged Rayner across the road to a safe location where he was treated by paramedics. The fire chief testified that Rayner did not appear to be coughing or suffering symptoms of smoke inhalation, nor did he appear to be injured, burned, or have singed hair. Sonya's body was found in the bedroom near a pile of sheetrock and insulation. The roof over Sonya's body remained intact, and no heavy objects lay in the vicinity of the body. He also found a large area of blood on the mattress where he found Sonya's body. A fire-scene investigator testified the fire was intentionally set. The medical examiner determined Sonya was dead before the fire started. He concluded that her death was a homicide and that she died from blunt-force trauma. Rayner also went to another BankPlus branch later that day and asked for a new debit card, and also inquired about closing Sonya's debit card and her separate bank account which they had only opened the day before. Rayner presented testimony regarding the electrical problems at the deer camp. He also called Dr. Steven Hayne to rebut the pathologist's testimony. Dr. Hayne opined Sonya's death was due to a drug overdose.

HELD: (1) The State submitted sufficient evidence for the jury to find deliberate design murder. The autopsy concluded the cause of death was blunt force trauma. There was no soot or smoke in Sonya's respiratory tract. It was his opinion that Sonya's blood found on the carpet was there before the fire. He did not believe the drugs and alcohol in her system were significant enough to cause her death. There was evidence of marital discord. The amount of blood found was inconsistent with a fire death. Rayner did not appear injured at the scene.

(2) The evidence did not justify a JNOV. Despite Dr. Hayne's testimony that Sonya died of a drug overdose, he admitted that he conducted no examination of Sonya's tissues. The jury choose to believe the State's pathologist.

(3) The trial judge did not err in denying a mistrial after the testimony of the liquor store clerk, who was asked about the flammable liquors her store sold. After objection, the jury was told to disregard the clerk's testimony, as she admitted she did not know what liquor Rayner purchased.

The trial judge also did not err in denying a mistrial after the testimony of one of Sonya's co-workers. She apparently became emotional and said, "Sonya did not deserve this." Rayner moved for a mistrial. Outside the presence of the jury, the parties agreed to stipulate to her testimony. The jury was told the witness would testify if called that Rayner came into the store the afternoon after the fire and inquired about Sonya's life insurance policy. The trial judge instructed the jury to disregard the testimony and only consider the stipulation. There was no abuse of discretion. The witness's comment did not imply Rayner killed her. Nothing indicates the jury disregarded the court's instructions.

(4) During Dr. Hayne's testimony, the prosecutor attempted to discredit him by asking him about the cases he had testified in that had been reversed by the Mississippi Supreme Court. During closing arugments, he referred to Dr. Hayne as "a discredited doctor." The trial court sustained an objection to this, instructing the jury to disregard the statement concerning Dr. Hayne's character. Counsel did not request a mistrial. The comment was not plain error. "...[T]he prosecutor's closing arguments reflect nothing more than a comment on the crediblity of the defense's evidence."

Rayner was also not denied a fair trial when the judge initially appointed the jury foreman. Upon objection, the court instructed the jury to choose its own foreman. He corrected the impression to the jury that the objection had been to who was appointed, but rather that the jury was to appoint. The jury subsequently chose the person the judge initially picked. Rayner failed to show that the trial judge's statements prejudiced his right to a fair trial.

To read the full opinion, click here:
http://courts.ms.gov/Images/Opinions/CO104990.pdf

James David Fortenberry v. State, No. 2013-KA-00134-COA (Miss.Ct.App. August 11, 2015)

CASE: Sexual Battery x2 and one count of Forcible Rape
SENTENCE: Three concurrent terms of 30 years on each count, with 10 suspended and 5 years of supervised probation

COURT: Rankin County Circuit Court
TRIAL JUDGE: Hon. John Huey Emfinger

APPELLANT ATTORNEY: John M. Colette, Sherwood Alexander Colette
APPELLEE ATTORNEY: Laura Hogan Tedder
DISTRICT ATTORNEY: Michael Guest

DISPOSITION: Affirmed. Irving, P.J., for the Court. Lee, C.J., Griffis, P.J., Barnes, Ishee, Carlton, Maxwell, Fair and James, JJ., Concur. Wilson, J., Not Participating.

ISSUES: (1) Whether he was denied effective assistance of counsel; (2) whether he was denied a fair trial as a result of prosecutorial misconduct; (3) whether the circuit court erred in denying his amended motion for a new trial; (4) whether the circuit court erred in its instructions to the jury; (5) whether the State failed to disclose the existence of *Brady* material; and (6) whether the circuit court abused its discretion in denying his motion for a new trial based on its finding that there was no *Brady* violation.

FACTS: On the night of February 15, 2011, Ellis Wilkerson and his girlfriend, Catherine Branch, were walking along a trail at the Brandon City Park. A man, wearing a ski mask and holding a gun, later identified as James David Fortenberry, appeared from the bushes and ordered them to get on the ground. He then forced Branch perform oral sex on him and then disappeared. A second assailant, later identified as Jeremy Holloway, Wilkerson's roommate, then appeared and also forced Branch to perform oral sex on him. He vaginally raped her and then forced her to perform oral sex a second time. After the assault, Wilkerson discouraged Branch from going to the police because the assailants had threatened them. He would not let Branch go home with him. Driving home, she decided to contact police. She was taken to the hospital and given a rape kit. Police went to Wilkerson's apartment to get a statement, but Holloway answered the door. He eventually gave permission to search his cell phone. There were several phone calls between Holloway, Fortenberry, and Wilkerson around the time of the assault. Police then obtained a warrant for Holloway's DNA, and Holloway gave consent to search his and Wilkerson's apartment. Police recovered a pistol inside a holster and a ski mask that Holloway admitted to using during the assault. Police then spoke with Fortenberry. Fortenberry initially denied being at the park. He was then asked to explain his cell-phone records, which indicated that he had been in the park area during the time the rape occurred. Fortenberry explained that he had car trouble and had to stop at a restaurant near the park to look at his car. He subsequently gave a statement admitting he and Holloway were playing a prank on Wilkerson and Branch. However, he denied ever touching Branch. After his conviction and notice of appeal, Fortenberry filed a motion seeking a stay of the appeal and a remand of the case for consideration of an alleged *Brady* violation. The circuit court held a hearing, but found no *Brady* violation. He appealed.

HELD: (1) After reviewing the record, the Court found it was insufficient to determine an ineffective assistance claim. The Court denied relief on this issue without prejudice. Fortenberry may, if he desires to do so, raise this claim in post-conviction.

(2) The State referenced both in opening and closing statements that Wilkerson told Branch not to go to the police. Fortenberry argued that the statements were improper because Wilkerson could not be questioned. However, Fortenberry did not object at the time, so the issue is waived.

Fortenberry further argued that the prosecutor committed misconduct by referring to him as a liar. The State was highlighting Fortenberry's changing stories. The State is allowed to comment on the weaknesses in a defendant's case. The comments did not amount to misconduct and did not create an unjust prejudice against Fortenberry.

Finally, Fortenberry argued that the State's comments about having DNA evidence was highly prejudicial, since the DNA implicated Holloway, not him. However, the State did not insinuate that the DNA was Fortenberry's. This was made clear during the State's opening statement. There was no cumulative error regarding prosecutorial misconduct.

(3) The trial judge did not err in denying his motion for a new trial. The core of Fortenberry's argument is that the State's evidence consisted of only the victim's at-times-controversial version of what happened, aided by the erroneous admission of hearsay evidence and leading questions by the State. Fortenberry's argument goes to the credibility of the evidence, and the jury decided to believe Branch.

(4) The trial judge did not err in denying Fortenberry's elements instruction which included language that the jury had to find that he specifically intended to aid and abet Holloway. The State's instruction was sufficient using the language, that "Fortenberry, individually or while aiding and abetting or while acting alone or in concert with another..." Further, Fortenberry cited no authority that S-4, the State's aiding and abetting instruction, was inadequate over his instruction.

> ...Instruction S-4, in conjunction with Instruction S-1, adequately informed the jury that it could not find Fortenberry guilty of the crimes committed by Holloway unless it found that Fortenberry deliberately associated himself in some way with the crimes and participated in them with the intent to bring about the crimes. In other words, the State was not required to identify the specific act of participation by Fortenberry, just that he participated in some way to bring the crime into fruition.

(5) and (6) The *Brady* hearing addressed whether the defendant's neighbor, Chris Moore, gave an exculpatory oral and written statement to police that was never given to Fortenberry. Fortenberry asserted that Moore overheard Branch recant her story, specifically stating that "it didn't happen." The circuit court ultimately held that the credibility of the officer's testimony outweighed Moore's testimony. The circuit court found that the State did not possess an oral or written statement by Moore. It found that the defendant, by using reasonable diligence, could have obtained whatever information Moore gave to police, as he was listed as a potential witness in the police report.

To read the full opinion, click here:
http://courts.ms.gov/Images/Opinions/CO104161.pdf

August 18, 2015

Leroy Harris v. State, No. 2013-KA-02009-COA (Miss.Ct.App. August 18, 2015)

CASE: Armed Robbery and w/ a firearm enhancement
SENTENCE: 20 years, with 15 to serve, followed by 5 years PRS, with a concurrent 5 years for the firearms enhancement

COURT: Washington County Circuit Court
TRIAL JUDGE: Hon. Richard A. Smith

APPELLANT ATTORNEY: Brandon Isaac Dorsey
APPELLEE ATTORNEY: Billy L. Gore
DISTRICT ATTORNEY: Willie Dewayne Richardson

DISPOSITION: Affirmed. Maxwell, J., for the Court. Lee, C.J., Irving and Griffis, P.JJ., Barnes, Ishee, Carlton, Fair, James and Wilson, JJ., Concur.

ISSUES: (1) Whether the defendant was denied a speedy trial, (2) whether the trial court erred in admitting a recording of the victim's 911 call, (3) whether the evidence was sufficient to support the verdict, and (4) whether the verdict was against the overwhelming weight of the evidence.

FACTS: On April 23, 2011, Rosella Jing was driving home from her family-owned furniture store in Greenville, when she noticed a blue truck following her. The truck pulled into her driveway behind her. Rosella tried to open her garage door, but it did not work. At this point, a man she later identified as Leroy Harris get out of the passenger's side of the truck. Harris waved a gun in front of her and yelled: "Give me your money." Harris reached through the cracked window and unlocked and opened her door. He then snatched her purse, sprinted back to the truck, and sped off. Rosella fled to her neighbor's house and called police. A deputy responding to the call saw a truck matching the description and attempted to stop it. The driver stopped, but the two men inside fled. The owner of the truck told police he let Warren Cunningham use it. Cunningham, (the driver of the truck), was later arrested. Rosella's purse and deposits from her business were found in the truck. Police also found a cell phone in the truck that they traced back to Harris. A pistol was also found in the truck and Harris's fingerprints were on the passenger-side outside door handle. Rosella testified she recently fired Cunningham from her business. She identified Harris as the robber in a photo line-up.

HELD: (1) Harris was not denied a speedy trial. Although he requested a speedy trial, he never set a hearing on his speedy-trial demand. His co-defendant also asked for several continuances which Harris did not object to. He only sought a severance right before trial. Finally, Harris failed to show the delay impaired his defense.

(2) The trial judge did not err in allowing a recording of the 911 call from Rosella to police about the robbery. Rosella had just been robbed at gunpoint and immediately relayed the details during the 911 call. Her descriptions to the dispatcher—while she was under the stress of an armed robbery—qualified as an excited utterance.

(3) and (4) The evidence was sufficient. Rosella had a clear view of Harris when he stuck a pistol in her face and grabbed her purse full of cash. She easily identified him from a photo lineup. When the two men fled from the truck, officers found Harris's cell phone, which displayed his photo as the screen saver, on the passenger seat. After linking the cell phone to Harris's mother's address, officers arrested him there. Harris's fingerprints matched the prints from the outside passenger handle of the truck.

To read the full opinion, click here:
http://courts.ms.gov/Images/Opinions/CO106761.pdf

Courtney R. Logan v. State, No. 2012-KA-01963-COA (Miss.Ct.App. August 18, 2015)

CASE: Kidnapping x5, one count of Aiding Escape, and one count of Possession of a Firearm by a Convicted Felon
SENTENCE: 7 consecutive life sentences without parole as an habitual offender

COURT: LeFlore County Circuit Court
TRIAL JUDGE: Hon. W. Ashley Hines

APPELLANT ATTORNEY: Hunter Nolan Aikens
APPELLEE ATTORNEY: Laura Hogan Tedder
DISTRICT ATTORNEY: Willie Dewayne Richardson

DISPOSITION: Affirmed. Lee, C.J., for the Court. Irving and Griffis, P.JJ., Barnes, Ishee, Carlton, Maxwell, Fair and Wilson, JJ., Concur. James, J., Concurs in Part and Dissents in Part with Separate Written Opinion.

ISSUES: (1) Whether the evidence was insufficient to support his convictions for kidnapping; (2) whether the trial court erred in sentencing him as a habitual offender; (3) whether the trial court erred in refusing D-15, a duress instruction; and (4) whether he received ineffective assistance of counsel.

FACTS: On June 25, 2009, transportation sergeants Chrissy Flowers, Perry Jones, and Leander Robertson transported Joseph L. Jackson, and one other inmate, of the Delta Correctional Facility for an eye examination at The Eye Station (the Clinic). Officer Robertson escorted Jackson through the back door, and Officer Jones escorted the other inmate. Officer Flowers followed behind them and remained at the back door. Jackson, who was serving a life sentence, was bound in full restraints, which included handcuffs, a waist chain, a black box, and leg irons. A few moments later, Courtney Logan, Jackson's cousin, entered the Clinic through the back door. Logan fired a shot in the air and ordered everyone to get on the floor. Logan threatened to kill Officer Flowers if she did not give him the keys to Jackson's restraints. Jackson changed into clothes Logan brought him, and he and Logan left. The officers and the employees of the Clinic all identified Logan at trial, and they all testified that they felt they were not free to leave during their encounter with Logan. Jackson and Logan, traveling in a rented black Dodge Magnum, were later stopped and taken into custody on I-40 just outside of Nashville. The service-weapon revolver taken from Officer Flowers was recovered. At trial, Logan claimed duress, testifying Jackson's father devised the escape plan, and felt he had no choice but to comply. He stated he feared Jackson's father would do something to his children if he didn't help. Logan was convicted on all counts and appealed.

HELD: (1) Logan argued that the confinement of the officers and the two employees of the Clinic was incident to the act of aiding Jackson's escape and was of no greater degree than necessary to accomplish Jackson's escape. However, the seizure of the employees and officers at gunpoint was a necessary constituent of the crime. Logan's purpose in doing so was to effectuate Jackson's escape as well as his own. Logan fired his gun twice in the air and took Officer Flowers's weapon during the seizure. Logan threatened to kill Officer Flowers at least two times and an employee of the Clinic at least once.

(2) Logan argued that the indictment charging him as a habitual offender failed to allege his prior convictions with particularity. Logan did not object to his habitual offender status at trial, so the claim

is barred. Regardless, the issue is without merit. At trial, the State introduced Exhibit S-17 to prove that Logan had a prior felony conviction in Kentucky for robbery in order to establish the charge of possession of a weapon by a convicted felon. Exhibit S-17 also provided that Logan pled guilty to fleeing or evading police in the first degree (fleeing on foot), and assault in the fourth degree. The fleeing charge and assault arose from an incident separate from the robbery. This was a felony in Kentucky and Logan served over a year for it. There is no requirement in §99-19-83 that Mississippi have a similar felony. These crimes were sufficient.

Additionally, Logan's indictment, as amended, contains the necessary information to support Logan's status as a habitual offender. The State attached numerous documents to its motion to amend Logan's indictment, including: his prior indictments describing the crimes with detail, his guilty-plea documents, his judgments of conviction, and a Kentucky Court of Appeals opinion affirming his robbery conviction. Logan did not object or dispute theses documents.

Finally, Logan argued that the State failed to meet its burden of proving his habitual-offender status because the pen packs were never formally introduced into evidence at the sentencing hearing. Again, the claim is barred for failing to object at trial. Regardless, at the sentencing hearing, the State requested that the trial court consider evidence of Logan's prior convictions that had been attached to the State's motion and also introduced into evidence at the guilt phase of trial. The State produced sufficient evidence to support Logan's habitual-offender status.

(3) Logan asserts that he only participated in Jackson's escape because a threat was made on his child. The trial court refused the instruction, finding that a threat of harm to a third person does not support a duress defense. The trial court also determined that any threat made on Logan's child was not imminent. Logan had many opportunities to avoid the results. The COA agreed. Logan's necessity-defense theory had no foundation in the evidence.

(4) Logan's claims of ineffective assistance are not apparent from the record. Logan's claim of ineffective assistance was dismissed without prejudice. Logan can raise the issue again in a petition for post-conviction relief.

James, J., concurring in part and dissenting in part:

Judge James dissented, arguing that even though the claim regarding his habitual offender status was procedurally barred, Logan had a fundamental right to be free from an illegal sentence. She agreed with Logan that his prior conviction for fleeing or evading police in Kentucky did not constitute a prior felony under §99-19-83. Under Mississippi law, resisting or obstructing a lawful arrest as a pedestrian would be a misdemeanor. "...I would hold that when determining whether a prior conviction constitutes a felony for purposes of the habitual-offender statute, the analysis must be done under Mississippi law."

The court also failed to properly amend the indictment, as the order did not attach a certified copy of the prior convictions. She also agreed it was error that the certified copies of the prior judgments of conviction were never formally introduced into evidence at the sentencing hearing.

To read the full opinion, click here:

http://courts.ms.gov/Images/Opinions/CO106472.pdf

Trevor Hoskins v. State, No. 2013-KA-01785-COA (Miss.Ct.App. August 18, 2015)

CASE: Domestic Aggravated Assault
SENTENCE: 20 years

COURT: Washington County Circuit Court
TRIAL JUDGE: Hon. W. Ashley Hines

APPELLANT ATTORNEY: Erin Elizabeth Pridgen
APPELLEE ATTORNEY: Jeffrey A. Klingfuss
DISTRICT ATTORNEY: Willie Dewayne Richardson

DISPOSITION: Affirmed. James, J., for the Court. Lee, C.J., Griffis, P.J., Ishee and Carlton, JJ., Concur. Irving, P.J., Maxwell and Fair, JJ., Concur in Part and in the Result Without Separate Written Opinion. Barnes, J., Concurs in Result Only Without Separate Written Opinion. Wilson, J., Not Participating.

ISSUES: (1) Whether the trial court erred in allowing the prosecution to substantially amend the indictment by adding an essential element to charge Hoskins with domestic aggravated assault, and (2) whether the trial court improperly allowed testimony from Linda Taylor, a prior domestic violence victim of Hoskins, to be used as character improper evidence against Hoskins.

FACTS: On July 4, 2012, around 6 a.m., Armilla Lucius called the police to her home. She told them that someone had beaten her, and that the person was in the bedroom asleep. The police immediately detained the man, identified as Trevor Hoskins. Lucius sustained several severe injuries: a broken right arm, a broken left leg, a broken nose, and a laceration on her skull. Lucius testified that after Hoskins dropped her off at home after work, she watched TV and fell asleep. She was awoken by Hoskins hitting her on the head with a beer bottle. Lucius attempted to flee, but Hoskins struck her with a baseball bat and continued to assault her. At some point, however, he went to sleep in the bedroom. At trial, the State was allowed to call Linda Taylor, who was also romantically involved with Hoskins, and that he physically abused her and sustained serious injuries. Hoskins was convicted and appealed.

HELD: (1) Eight months before trial, the State filed a motion to amend the indictment to add the words "[‘]who had a romantic relationship with or was the girlfriend to Trevor Hoskins at the time of the aggravated assault[’] after the words ‘a person,' in the indictment." The trial court did not err in granting the motion. The amendment was to form and not of substance to the indictment. Hoskins’s indictment was titled "domestic aggravated assault," and cited §97-3-7(4). The amendment corrected a scrivener's error.

(2) Hoskins argued that Taylor's testimony that he assaulted her months before is evidence of a prior bad act and should not have been admitted. Taylor's testimony was offered to prove the knowledge, intent, lack of mistake, plan, and motive of Hoskins in committing the assault. Secondly, the probative value of the testimony outweighed the prejudicial effect on Hoskins. Taylor's assault

occurred mere months before the incident that lead to the charges in this case. Even if inadmissible, it was harmless error given the overwhelming weight of the evidence against Hoskins.

To read the full opinion, click here:
http://courts.ms.gov/Images/Opinions/CO105473.pdf

August 25, 2015

Courtney McGahee v. State, No. 2014-KA-00442-COA (Miss.Ct.App. August 25, 2015)

CASE: Possession of a Controlled Substance in a Correctional Facility
SENTENCE: 7 years as an habitual offender

COURT: Leflore County Circuit Court
TRIAL JUDGE: Hon. Richard A. Smith

APPELLANT ATTORNEY: W. S. Stuckey, Jr.
APPELLEE ATTORNEY: Jeffrey A. Klingfuss
DISTRICT ATTORNEY: Willie Dewayne Richardson

DISPOSITION: Affirmed. James, J., for the Court. Lee, C.J., Irving and Griffis, P.JJ., Ishee, Carlton, Maxwell, Fair and Wilson, JJ., Concur. Barnes, J., Concurs in Part and in the Result Without Separate Written Opinion.

ISSUE: *Lindsey* brief. Whether there were any arguable issues for appeal.

FACTS: On January 4, 2013, correctional officers at the Leflore County Adult Detention Center smelled tobacco smoke. The officers determined the smoke was coming from cell B-4. As the officers arrived, four inmates were attempting to leave the cell. The officers conducted a "shakedown" by thoroughly searching everything in the cell. Only inmate Tavarison Kinds was assigned to cell B-4. During the search, Kinds remained inside the cell, two inmates came out of the cell, and Courtney McGahee stood outside the cell by the door. During the search, Officers discovered a ziplock bag containing tobacco, and a sock containing a plastic bag with marijuana inside. When the marijuana was discovered, McGahee stated that it belonged to him. On January 8, 2013, McGahee signed a written statement, asserting that he threw the sock containing marijuana under Kinds's bunk in cell B-4. The statement also admitted that the tobacco and marijuana were his and that he was not threatened or promised anything by confessing. However, at trial, McGahee testified that he lied and was merely trying to help someone out because he believed he would never be charged. He was convicted and his appellate counsel filed a *Lindsey* brief. McGahee did not file a pro se brief.

HELD: "After reviewing the record, we find no reversible error and no issue that would require additional briefing by counsel."

To read the full opinion, click here:
http://courts.ms.gov/Images/Opinions/CO105475.pdf

Eugene Washington v. State, No. 2013-KA-00878-COA (Miss.Ct.App. August 25, 2015)

CASE: Count I, Sexual Battery, Count II, Sexual Battery, Count III, Statutory Rape, Count IV, Sexual Battery, Count V, Attempted Sexual Battery, Count VI, Statutory Rape, and Count VII, Failure to Register as a Sexual Offender
SENTENCE: Life on Counts I-IV and VI, 10 years on Count V, and 5 years on Count VII, all consecutively

COURT: Washington County Circuit Court
TRIAL JUDGE: Hon. W. Ashley Hines

APPELLANT ATTORNEY: W. Daniel Hinchcliff and Eugene Washington (Pro Se)
APPELLEE ATTORNEY: LaDonna C. Holland
DISTRICT ATTORNEY: Willie Dewayne Richardson

DISPOSITION: Affirmed. Fair, J., for the Court. Lee, C.J., Irving and Griffis, P.JJ., Barnes, Ishee, Carlton, Maxwell, James and Wilson, JJ., Concur.

ISSUES: *Lindsey* brief. Pro Se issues: (1) Whether the trial court erred in allowing perjured testimony, (2) whether the evidence was sufficient, and (3) whether the verdict was against the weight of the evidence.

FACTS: Eugene Washington was convicted of six counts related to the sexual abuse of Abby, his stepdaughter, over the course of about six months, with the last occurring on Abby's 13th birthday. Washington was also convicted of failure to register as a sexual offender. At trial, the prosecution primarily relied on the testimony of the victim, who recounted the incidents with significant detail and specificity. Her mother also testified to how, a few weeks before Abby confessed the abuse to her, she had found Abby and Washington awake around 5 a.m., which was unusual, and their explanations of what they had been doing were suspicious. Abby claimed to have gotten up to use the restroom, but not the one she usually used; and Washington claimed to be preparing a lunch for work, but no food was out. Abby confessed the abuse to her mother after her mother threatened to take her to be examined by a doctor. The prosecution also offered the testimony of "Betty," another stepdaughter who had suffered similar abuse at Washington's hands several years before. A limiting instruction was given. Washington testified in his own defense. He admitted he had not registered as a sex offender in Mississippi, after moving here from Tennessee about six months before his arrest. He otherwise denied the allegations. Washington was convicted and appealed. His appellate attorney filed a *Lindsey* brief. Washington file a pro se brief.

HELD: (1) Washington contends that the testimony regarding the abuse of Betty after his conviction for sexual battery was perjured. The testimony cited by Washington is not necessarily contradictory, much less shown to have been perjured. Further, the prior bad acts evidence does not need to result in a conviction.

(2) and (3) The evidence was sufficient. Washington bases his argument almost entirely on a medical examination of the victim, conducted some weeks after the final assault, which found that her anus and hymen were "normal," showing no scarring or injury. Washington also notes that Abby testified

that the acts Washington performed on her did not hurt or cause her to bleed, and he questions whether she sufficiently described penetration when testifying to incidents of oral sex on her. However, injury is not required to prove penetration. Further, the jury determines credibility.

To read the full opinion, click here:
http://courts.ms.gov/Images/Opinions/CO105657.pdf

September 8, 2015

Oscar Lee Bailey v. State, No. 2014-KA-00711-COA (Miss.Ct.App. September 8, 2015)

CASE: Taking Possession of or Taking Away a Motor Vehicle
SENTENCE: 6 years

COURT: Harrison County Circuit Court
TRIAL JUDGE: Hon. Roger T. Clark

APPELLANT ATTORNEY: Benjamin Allen Suber
APPELLEE ATTORNEY: Billy L. Gore
DISTRICT ATTORNEY: Joel Smith

DISPOSITION: Affirmed. Fair, J., for the Court. Lee, C.J., Irving and Griffis, P.JJ., Barnes, Ishee, Carlton, Maxwell, James and Wilson, JJ., Concur.

ISSUE: Whether Defense counsel complied with *Lindsey v. State's* requirements when he filed a *Lindsey* brief, stating he could not find any appealable issues.

FACTS: In early December 2012, Oscar Lee Bailey, a mechanic, told his customer, Gladys Ketchings, that he wanted to keep her 2001 Ford Taurus overnight to check a leak. Bailey never returned the car. Ketchings tried calling Bailey several times, but he never answered. Ketchings eventually contacted police. Ten months later Bailey was arrested after being pulled over in Ketchings's car. Bailey represented himself at trial. He stated that he was liable for a civil action, but not a criminal one, since he lacked intent. When asked why it took nearly ten months to return the car to Ketchings, he merely stated that he could not repair the car before then. The jury found Bailey guilty of taking possession of or taking away a motor vehicle. On appeal, Bailey's appellate attorney filed a *Lindsey* brief, finding no arguable issues to raise. He did not file a pro se brief.

HELD: Bailey's conviction and sentence were affirmed. The court independently reviewed the record and found no arguable issues that required supplemental briefing.

To read the full opinion, click here:
http://courts.ms.gov/Images/Opinions/CO106205.pdf

Christopher Grady v. State, No. 2014-KA-00787-COA (Miss.Ct.App. September 8, 2015)

CASE: Possession of a Controlled Substance

SENTENCE: 30 years, with 5 years suspended under the terms and conditions of PRS

COURT: Lowndes County Circuit Court
TRIAL JUDGE: Hon. Lee J. Howard

APPELLANT ATTORNEY: W. Daniel Hinchcliff
APPELLEE ATTORNEY: Billy L. Gore
DISTRICT ATTORNEY: Forrest Allgood

DISPOSITION: Affirmed. Fair, J., for the Court. Lee, C.J., Irving and Griffis, P.JJ., Barnes, Ishee, Carlton, Maxwell and Wilson, JJ., Concur. James, J., Concurs in Part Without Separate Written Opinion.

ISSUE: Whether the Defendant's ineffective assistance of counsel appeal claim should be dismissed without prejudice.

FACTS: On the evening of October 25, 2012, Officer Jon Rice pulled Christopher Grady over for a nonfunctioning headlight. A check of Grady's drivers license showed it was suspended. Rice asked Grady about possible contraband in the vehicle. Rice testified at trial that when he first approached the vehicle, he saw a "green leafy substance" in a white plastic bag sticking out from a suitcase in the back seat. He stated that he could also smell a strong odor of raw marijuana coming from the vehicle. After he removed Grady and his passenger from the vehicle, he performed a search incident to arrest. Rice eventually went to the car and searched where he said he had seen the "green leafy substance" when he first approached the vehicle. He unzipped the suitcase and recovered 10.66 kilograms of marijuana from Grady's vehicle. The State introduced footage from Rice's body camera into evidence. The video somewhat contradicted Rice's testimony. For example, he did not appear to notice the presence of marijuana until he pulled the suitcase out of the vehicle. Grady's counsel did not challenge the validity of the search. He appealed his conviction claiming his counsel's failure to move to suppress the marijuana constituted ineffective assistance of counsel.

HELD: The court found the record did not affirmatively indicate that Grady suffered denial of effective assistance of counsel of constitutional dimensions. Nor did the parties stipulate that the record was adequate to allow the appellate court to make a finding without considering the findings of fact by the trial judge. When the record cannot support an ineffective assistance of counsel claim on direct appeal, the appropriate conclusion is to deny relief, preserving the defendant's right to argue the same issue through a petition for post-conviction relief.

To read the full opinion, click here:
http://courts.ms.gov/Images/Opinions/CO106207.pdf

Michael Leroy Knight v. State, No. 2014-KA-00992-COA (Miss.Ct.App. September 8, 2015)

CASE: Possession of a Controlled Substance with Intent to Distribute x2
SENTENCE: Life w/o Parole as an habitual offender (concurrently on both counts)

COURT: Harrison County Circuit Court

TRIAL JUDGE: Hon. Lisa P. Dodson

APPELLANT ATTORNEY: Mollie Marie Mcmillin, Michael Knight (Pro Se)
APPELLEE ATTORNEY: Alicia Marie Ainsworth
DISTRICT ATTORNEY: Joel Smith

DISPOSITION: Affirmed. Fair, J., for the Court. Lee, C.J., Irving and Griffis, P.JJ., Barnes, Ishee, Carlton, Maxwell and Wilson, JJ., Concur. James, J., Concurs in Part Without Separate Written Opinion.

ISSUES: (1) Whether the denial of the motions to suppress Knight's confession and his wife's pills was erroneous, (2) whether the defendant's deceased wife's pills should have been excluded, (3) whether the trial court erred in refusing to require the prosecution to reveal the identity of the confidential informant, (4) whether the evidence was sufficient to convict the defendant with intent to distribute, and (5) whether the State proved the defendant's status as a habitual offender.

FACTS: Based on the tip of a confidential informant, the police found Michael Knight and his wife with valid prescriptions for Oxycodone and Methadone, but they were found to be missing hundreds of pills from prescriptions that had been filled recently, and Knight had more than a thousand dollars in cash on his person. Knight confessed that he had been selling his pills. His wife died before trial and was never charged. Knight argued his confession was induced by the belief that officers would make his charges go away if he cooperated, as he had helped the interrogating officer in the past when he was not the dealer. After his confession an officer stated that helping them catch another drug dealer would be Knight's “ticket out.” The trial court only suppressed statements made after the officer’s comment about his “ticket out.” Knight was convicted of two counts of possession of a controlled substance with intent to distribute. He appealed.

HELD: (1) The trial judge did not err in finding Knight's confession was not induced by extreme intoxication or promises. Three officers testified that Knight did not appear intoxicated during his confession, and the court was allowed to make an independent evaluation of Knight's mental state by reviewing the some of Knight's police interview. The court found there was no creditable evidence of an offer of reward from the authorities that would render Knight's confession inadmissible. The interrogating officer's "ticket out" remark was made long after Knight had confessed. Out of an abundance of caution, the trial judge suppressed any further statements made by Knight after the officer’s “ticket out” comment.

(2) The court rejected Knight's argument that his wife's pills should have been excluded under MRE 403. During the search, police found four bottles of prescription pills. Two bottles were in Knight's name and two were in his wife's name. Both prescriptions had been filled in Alabama shortly before the warrant was obtained – Knight's on the same day and his wife's the day before. The trial court did not abuse its discretion in admitting his wife's pills on the theory that they were part of a common scheme and that the large number of missing pills from both individuals' prescriptions was evidence that Knight did not hold his for personal use.

(3) In his pro se brief, Knight alleged that the trial court denied him constitutional protections by refusing to require the prosecution to identify the confidential informant who provided information

to the officers that established probable cause for the search of his hotel room. He moved to learn the identity of the CI prior to trial, but subsequently abandoned it. Because Knight did not argue his motion and secure a ruling on it, the issue was waived.

(4) The Court rejected Knight's argument that he did not intend to sell his pills. Given Knight's admission that he was actually selling pills "to several people- a lot of people," and the fact that many pills were missing from a prescription he had filled the same day, and he was in possession of a large amount of cash, the Court found there was sufficient evidence for a reasonable juror to find beyond a reasonable doubt that Knight possessed the remaining pills with intent to distribute

(5) Knight argued that the State did not prove his status as a habitual offender, but that the judge did it herself. However, the Court found that the trial judge was reviewing evidence and making formal findings of fact, not presenting it. It was the State that introduced Knights drugs into evidence, and Knight's attorney conceded that he had no legitimate basis to object.

To read the full opinion, click here:
http://courts.ms.gov/Images/Opinions/CO106111.pdf

Jeremy A. Snyder v. State, No. 2014-KA-00499-COA (Miss.Ct.App. September 8, 2015)

CASE: Felony DUI
SENTENCE: 5 years, with 2 to serve, 3 years suspended, and 5 years of PRS

COURT: Lauderdale County Circuit Court
TRIAL JUDGE: Hon. Robert Walter Bailey

APPELLANT ATTORNEY: George T. Holmes, Phillip Broadhead
APPELLEE ATTORNEY: Laura Hogan Tedder, John R. Henry, Jr.
DISTRICT ATTORNEY: Bilbo Mitchell

DISPOSITION: Affirmed. Maxwell, J., for the Court. Lee, C.J., Irving and Griffis, P.JJ., Barnes, Ishee, Carlton, Fair, James and Wilson, JJ., Concur.

ISSUES: (1) Whether the trial judge erred in allowing a stipulation of defendant's prior DUI convictions, (2) whether the State committed prosecutorial misconduct by mentioning Snyder's prior DUIs during closing argument, (3) whether officer's reference to his truck smelling like marijuana should have been excluded, (4) whether defendant was entitled to spoliation of evidence instruction because police erased dash-cam video of his arrest.

FACTS: On October 6, 2012, Jeremy Snyder was pulled over for speeding. He told officers he had been drinking earlier that evening. The officer stated his truck smelled like marijuana. Snyder refused all sobriety and breathalyzer tests. He admitted to police he had been arrested for DUI before and that his attorney advised him to refuse all breathalyzer tests. Because this was Snyder's third DUI, he was charged with felony DUI. The trial judge denied Snyder's motion in limine to keep the State from mentioning his prior two DUI convictions or the marijuana smell in the car. Snyder stipulated

to his prior DUI convictions. During the State's case and closing argument, the prosecutor brought up Snyder's earlier DUIs.

HELD: (1) The trial court accepted Snyder's stipulation and gave a limiting instruction to the jury to only consider Snyder's prior DUIs as evidence of that element of the crime of felony DUI. The State's reference to Snyder's prior DUIs was not to prove Snyder had a propensity to drive while intoxicated—a violation of MRE 404(b), but to show knowledge and intent. The State mentioned Snyder's prior experience with field sobriety and breathalyzer tests to prove Snyder knew he was intoxicated and would fail these tests, which is why he refused them.

The court found evidence that Snyder refused to submit to a chemical test was relevant and admissible because § 63-11-41 allows it, and because Snyder told the officer his reason for not blowing was that he believed he would fail the test. The court held that the reasons why someone would refuse a breathalyzer test are relevant.

(2) Snyder argued the State's "not his first rodeo" comment unjustly prejudiced the jury by encouraging it to find Snyder guilty based on his past DUIs. However, Snyder's counsel did not object to this argument. Snyder was not unjustly prejudiced by the State's referencing his prior DUIs, and his failure to take the field sobriety tests and the Intoxilyzer test.

> We find the phrase "not his first rodeo" falls within the wide latitude given attorneys during argument. It was certainly not "so inflammatory" as to require a sua sponte objection by the judge. Indeed, the very reason Snyder was on trial for felony DUI was that this was not "his first rodeo."

(3) The court found that the officer was simply testifying what the truck smelled like, not that Snyder or his passenger were high. Since Snyder refused the field and chemical tests, the State's case hinged on the officers' observance to tell the complete story, even if it included bad acts by the Defendant.

(4) The court found that Snyder was not entitled to spoliation of the evidence instruction because he presented no evidence the officer intentionally destroyed the memory card from his dash-cam the night of his arrest. There was no due-process violation from the dash-cam video not being preserved. First, the video had not been requested before it was recorded over, and secondly, Snyder failed to show the video was exculpatory. He presented nothing that contradicted the three officers' version of the events that night.

Snyder's argument is basically that the video would have been "better" evidence than the officers' testimony. Any exculpatory value from the video would have been significantly reduced by Snyder's admission he had been drinking that night before being pulled over and refusing field sobriety and Intoxilyzer tests.

To read the full opinion, click here:
http://courts.ms.gov/Images/Opinions/CO105610.pdf

Charles L. Kuebler v. State, No. 2012-KA-01825-COA (Miss.Ct.App. September 8, 2015)

CASE: Deliberate Design Murder
SENTENCE: Life

COURT: Hinds County Circuit Court
TRIAL JUDGE: Hon. Winston L. Kidd

APPELLANT ATTORNEY: Edward Blackmon Jr., David Paul Voisin, Jane E. Tucker
APPELLEE ATTORNEY: Jeffrey A. Klingfuss, Melanie Dotson Thomas
DISTRICT ATTORNEY: Robert Shuler Smith

DISPOSITION: Affirmed. Barnes, J., for the Court. Lee, C.J., Irving and Griffis, P.JJ., Concur. Maxwell and Fair, JJ., Concur in Part and in the Result Without Separate Written Opinion. James, J., Concurs in Part Without Separate Written Opinion. Carlton, J., Concurs in Result Only Without Separate Written Opinion. Wilson, J., Concurs in Part and Dissents in Part with Separate Written Opinion, Joined by Ishee, J.; Carlton, J., Joins in Part with Separate Written Opinion.

ISSUES: (1) Whether trial court erred by allowing evidence and instruction regarding defendant's flight; (2) whether the trial court erred in denying defendant's motion for mistrial and continuance when the State announced victim's gunshot residue test results the third day of trial; (3) whether it was error to grant the State's motion in limine to exclude the victim's toxicology report and evidence of the victim's mental state, and whether it was error to exclude several text messages victim sent before her death; (4) whether it was error to deny defendant's motion in limine to exclude hearsay statements; (5) whether it was error to allow testimony about white powder found in defendant's home, and to admit evidence of defendant's behavior during police questioning; (6) whether there was prosecutorial misconduct; (7) whether the trial judge erred in failing to make a record of advising Kuebler of his right to testify; (8) whether it was error to refuse defendant's proposed jury instructions and accepting the State's jury instructions; (9) whether the evidence was sufficient; ans (10) whether there was cumulative error.

FACTS: Charles "Louie" Kuebler was convicted of the deliberate design murder of Tamra "Tammy" Stuckey. Tamra had been staying with Kuebler at his apartment in Jackson. The exact status of their relationship was unclear, but testimony showed Tamra was romantically interested in Kuebler, but he was apparently not interested in her. On June 20, 2010, the evening before her death, several witnesses testified Kuebler was verbally berating Tamra, telling her to shut-up and not allowing her to participate in conversations with friends. Tamra had to be at work at 5:00 a.m. in the morning, so she retired to Kuebler's apartment shortly after midnight. At 1:18 a.m., she called a friend, crying. She said Kuebler was being "mean" and "ugly" to her. At 1:35 a.m. she sent another friend a test message stating, "Wake up…I need [yo]u to save me." Shortly after 2 a.m., neighbors heard Kuebler screaming "hysterically." Tamra was found lying on the couch, shot in the forehead. When asked what happened, Kuebler said he and Tamra "were fooling around with each other and that she enjoyed him holding the gun to her head while they had sex." Another witness testified he saw Kuebler, covered in Tamra's blood, attempting to give her CPR. Kuebler explained that the gun had fallen on the ground and gone off. When police tried to question Kuebler he became belligerent, shouted racial slurs at them, and ultimately kicked out a police patrol car window. After his indictment, Kuebler eventually made bond. Several months later, Kuebler cut his ankle monitor and fled. There was a

chase in Louisiana when police tried to arrest him. Kuebler's defense at trial was that Tamra committed suicide or accidently shot herself. He was convicted and appealed.

HELD: (1) The trial court erred in admitting evidence of Kuebler's flight, and the trial judge should not have granted the State's instruction on flight. However, the Court found the error harmless. Kuebler had expressed an independent reason for his flight—to avoid returning to the detention center because he feared he would be beaten again. Further, the time from of the commission of the crime to the alleged flight was lengthy—over one year—causing the alleged flight information to be more prejudicial than probative under Rule 403.

(2) Gunshot residue was found on Kuebler, but the crime lab witness explained they no longer check victims for gunshot residue since it was common for victims to have residue on them. However, in this case, the pathologist did swab Tamra's hands for gunshot residue. Prior to trial, the defense discovered the kit was never tested. The State submitted it for testing immediately before trial. The results were given to the defense on the third day of trial. The defense was not prejudiced by the late disclosure. Kuebler failed to prove a *Brady* violation, as the evidence was not suppressed by the State, and the results of the test did not undermine the defense theory of accident or suicide.

(3) The trial court committed no error in granting the State's motion in limine to exclude the victim's toxicology report, and evidence of her prescription drug use. Kuebler was not claiming he killed the victim in self-defense, but that it was an accident or suicide. Kuebler laid no foundation for admitting the victim's drug use. His expert, Dr. Steven Hayne, merely speculated in an unsworn statement that there was a possibility that drugs could have caused her to be manic or delusional. There were no facts to support his contentions. Kuebler never testified that the victim was threatening suicide. Thus, Kuebler never submitted any evidence showing a nexus between the victim's toxicology report and her alleged suicidal actions during the shooting.

The trial court also did not err in excluding several text messages the victim sent within 24 hours of her death. The court found that most of the texts had nothing to do with whether the victim was suicidal. The texts expressed the victim's feelings for Kuebler, worry about payment of automotive repairs, and information about the victim's drug use during the day of her death.

(4) The trial court did not err when it denied the defense's motion in limine to exclude the victim's call to a friend telling her Kuebler was being mean to her, or a call to a friend who told get away, and a text asking a friend to save her. These communications were admissible hearsay under Rule 803(1) as a present sense impression. They also showed the victim's then-existing mental or emotional state—that she was crying and upset. The trial court did not err in denying a mistrial after a detective testified that he was investigating a victim that "was possibly shot with a weapon that was in the location by a Mr. Charles Kuebler." The detective was one of eight police officers to testify similarly that they found Kuebler and the victim alone, covered in blood, at the time of the shooting.

(5) The trial court did not err when it allowed officer testimony and a photograph of "white powder" found in Kuebler's apartment. The officer testified on cross that he did not know if the powder had anything to do with Kuebler or the victim. The testimony did not constitute prejudicial reversible error because the white powder was never connected to Kuebler or the victim. Furthermore, a limiting instruction was given to the jury.

The Court found no error regarding the admission of Kuebler's belligerent behavior, racial slurs against the police during questioning, and evidence he kicked out the window of a patrol car. This was admissible as evidence of consciousness of guilt. The probative value of his actions immediately following Tamra's death was high, and outweighed any prejudicial impact under MRE 403.

(6) During closing argument the State suggested that an officer had perjured himself when he considered the gun may have been moved (although the officer never expressly stated this possibility) at the crime scene. The defense objected, and the judge instructed the jury to disregard the statement. The court did not find the State's improper comment as unduly prejudiced or inflamed the jury.

Kuebler also complained that during closing argument the prosecutor provided details about the victim's life that were not in evidence—where she attended college, where she was employed, and that she was a kind, sweet person. The State conceded that the information was not in the record. The court failed to see how this information prejudiced him to the extent it caused the jury to find him guilty of murder.

Counsel filed a motion in limine to prohibit the State from mentioning that Kuebler sought legal assistance during his interrogation. The motion was granted. However, a police detective stated that after he advised Kuebler of his rights, Kuebler stated he needed an attorney. Defense counsel objected and asked for a mistrial. The Court found that the detective incidentally offered the information as he was answering a question about why Kuebler was brought into his office. Given the context of the comment, there was no reversible error.

(7) Kuebler submitted that the trial court erred in failing to engage him in a colloquy about his fundamental right to testify in his own defense. The record was silent as to whether Kuebler intended to waive his right to testify. However, there were several bench conferences that were not transcribed. The court dismissed the issue without prejudice so Kuebler could have the opportunity to pursue it in post-conviction.

(8) The trial judge did not err in failing to grant an accident instruction. The court found that Kuebler's actions at the crime scene—hysterically asking the police for medical assistance for the victim even though she was pronounced dead—did not imply it was an accident. Neither did lack of motive and gunshot residue on the victim's hands. A neighbor testified that Kuebler stated that he was having sex with Tamra when the gun discharged. There was insufficient evidence to warrant this instruction.

There was no error in granting the State’s instruction on deliberate design murder which included language on depraved heart murder. The Court rejected Kuebler's argument that there was no evidence to support depraved-heart murder, but only evidence to support an instruction on culpable negligence manslaughter. Kuebler told inconsistent stories of what happened—the victim's death was an accident while they were having sex, or the gun fell to the ground and accidently discharged. Regardless of which version of events the jury believed, there was ample evidence of reckless and eminently dangerous actions directed at the victim.

The court’s additional instruction on the definition of depraved heart murder was proper. Depraved heart murder involves a higher recklessness from which malice or deliberate design may be implied.

There was a jury question on Kuebler's culpability or degree of recklessness. The instruction on culpable negligence manslaughter was also proper.

(9) The Court found that the sufficiency and weight of the evidence were adequate to convict Kuebler of murder. Kuebler deliberately pointed the loaded gun at the victim's head and pulled the trigger. The police noted the victim's feet were tucked into the couch as if she had been sleeping, in a position inconsistent with a struggle or sexual intercourse. Text messages sent moments before her death showed Kuebler was angry and the victim thought she needed saving. It did not matter whether Kuebler's actions were intentional or reckless, because both constitute murder. A firearms-expert testified that the gun could not have accidentally discharged. Finally, the trajectory of the bullet and the shooting distance of 2½ to 3 feet effectively ruled out suicide.

(10) There was no cumulative error. While the Court found error with the admission of evidence of flight and the related jury instruction, it was not reversible error. Thus, it found no prejudice occurred individually or cumulatively.

Wilson, J., Concurring in Part and Dissenting in Part:

Judge Wilson agreed with the majority's resolution of most of Kuebler's claims on appeal. However, rather than affirming the conviction and sentence, he concluded it was necessary to remand the case to the trial court for the limited purpose of making a finding of fact whether a discovery violation occurred concerning Tamra's gunshot residue kit. He also believed the trial judge did not err in allowing evidence of flight. There was no proof Kuebler fled based on his alleged fear of being beaten when he returned to jail.

He also cited other errors, but did not believe they warranted a reversal of the case. He believed Tamra's drug use on the day of the murder was not "character evidence." Kuebler did not offer evidence that Tamra had a general tendency or propensity to use drugs, but rather, he sought to show that she had in fact been using a variety of drugs and alcohol that entire day, which could have impaired her thinking and contributed to a suicide or accident. Finally, he did not believe Kuebler sufficiently objected to testimony regarding his belligerence and racial slurs against police. Had there been a proper objection, it would have been an abuse of discretion to allow the testimony.

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Carlton, J., Joining in Part:

Judge Carlton concurred with Judge Wilson's finding of no abuse of discretion by the trial court in admitting the evidence of Kuebler's flight or by giving the flight instruction. She also found the that the record failed to show the State suppressed exculpatory evidence in violation of *Brady*. The gunshot residue evidence was collected on the day of Tamra's death. However, since the lab received no request from the defense or the State to test the kit, the kit was subsequently returned to the police. "I submit that the defense's failure to request its own testing of evidence collected and submitted to the Mississippi Crime Lab does not render the evidence to be new or suppressed."

To read the full opinion, click here:
http://courts.ms.gov/Images/Opinions/CO107226.pdf

September 15, 2015

Joe Johnson v. State, No. 2014-KA-00094-COA (Miss.Ct.App. September 15, 2015)

CASE: Armed Robbery
SENTENCE: : 25 years, with 5 years suspended and 5 years of PRS

COURT: Forrest County Circuit Court
TRIAL JUDGE: Hon. Robert B. Helfrich

APPELLANT ATTORNEY: George Holmes, Mollie Marie McMillin
APPELLEE ATTORNEY: Scott Stuart
DISTRICT ATTORNEY: Patricia A. Thomas Burchell

DISPOSITION: Affirmed. Wilson, J., for the Court. Lee, C.J., Irving and Griffis, P.JJ., Barnes, Ishee, Carlton, Maxwell, Fair and James, JJ. Concur

ISSUES: (1) Whether Johnson's trial counsel provided ineffective assistance; (2) whether Johnson's appellate counsel's *Lindsey* brief constituted ineffective assistance of counsel; and (3) whether the trial court erred by unfairly limiting Johnson's cross-examination of his girlfriend.

FACTS: On March 1, 2013, Joseph Dailey waited outside the bank for it to open to withdraw $2,600. He next went to the post office to purchase a $450 money order. After returning to his car, a man flashed what appeared to be a police badge at him, and stuck a gun into the open car window. He took $2,200 from Dailey and fled. A witness saw him leaving the parking lot in a white Chevrolet Monte Carlo. As the robber seemed to know Dailey had cash, they reviewed bank surveillance photos. The photographs showed a man in a distinctive dark jacket with white lettering, which looked like it could be some sort of security jacket. When shown the photos, Daley said that the man wearing the jacket looked like the robber. Deputy Phillip Hendricks responded to the BOLO for the white Monte Carlo, because he had previously encountered Joe Johnson driving a white Monte Carlo, wearing a security badge, and carrying a handgun. When officers arrived at Johnson's home, he initially hid in a closet and told his girlfriend, Vicki Reese, to tell the officers that he was not home. However, when they threatened to get a warrant, Johnson came out and consented to a search. Police found what appeared to be the same jacket worn by the person in the bank surveillance photos. Johnson admitted to being at the bank and the post office, but left because the line was too long. Johnson was later positively identified as the robber by Dailey in a photo line up. Reese testified that Johnson told her where he hid $2,200, and to use it to post his bond. Johnson also told her to take some guns hidden in his home to a woman in Magee. Appellate counsel filed a *Lindsey* brief, and Johnson filed a pro se brief.

HELD: (1) The ineffective assistance claim could not be adjudicated on the present record, may be raised in a post-conviction. The claims in Johnson's affidavit were not supported by the record. Claims regarding the failure to quash an indictment and failure obtain a ruling on a motion in limine, were capable of adjudication on direct appeal, but lacked merit. The omission of the clerk's file stamp on the indictment was a matter of form, and did not require dismissal of the indictment. The

indictment was properly dated and signed and there was not doubt Johnson was informed of the nature of the charges against him.

Counsel's failure to obtain a ruling on a pretrial motion in limine, and to prohibit witness statements and a written narrative by a deputy from being shown to the jury did not constitute ineffective assistance of counsel. While there was no written or on-the-record ruling on the motion, the defendant did not cite, and the Court did not find any instance in which such evidence was admitted or shown to the jury. The issue was without merit.

(2) Johnson's appellate counsel's *Lindsey* brief was proper and did not constitute ineffective assistance of counsel. The court reviewed the record and the issues raised in Johnson's pro se brief, finding no arguable issues for appeal.

(3) The claim was waived for failing to object at trial. While Johnson's attorney was cross examining Reese, the prosecutor objected at one point during the cross-examination. There was an off-the-record bench conference, and cross-examination continued without an on-the-record ruling. Johnson's attorney was able to make the points through his cross examination that Reese's second statement to police differed greatly from her first, and that she waited two months to come forward with information that incriminated him. Thus, even if there was error, the error was harmless.

To read the full opinion, click here:
http://courts.ms.gov/Images/Opinions/CO106500.pdf

Jeremy Wade Holloway v. State, No. 2012-KA-01389-COA (Miss.Ct.App. September 15, 2015)

CASE: Sexual Battery x2, and one count of Rape
SENTENCE: Concurrent terms of 30 years for each sexual-battery, and a concurrent term of 40 years for the rape, with 10 years suspended and 5 years of supervised probation.

COURT: Rankin County Circuit Court
TRIAL JUDGE: Hon. John Huey Emfinger

APPELLANT ATTORNEY: Clarence Terrell Guthrie III, Todd A. Coker
APPELLEE ATTORNEY: Lisa Blount
DISTRICT ATTORNEY: Michael Guest

DISPOSITION: Affirmed. Irving, P.J., for the Court. Lee, C.J., Griffis, P.J., Barnes, Ishee, Carlton, Maxwell, Fair, James, and Wilson, JJ. Concur.

ISSUES: (1) Whether the circuit court erred in denying admission of the evidence of the victim's post-assault sexual activities with her boyfriend, improperly characterizing the evidence as Rule 412 evidence; (2) whether the circuit court erred in granting the State's motion to exclude evidence that the victim attempted to prevent the case from proceeding; (3) whether the evidence was sufficient; (4) whether the circuit court erred in finding no *Brady* violation; and (5) whether there was cumulative error.

FACTS: On the night of February 15, 2011, Ellis Wilkerson and his girlfriend, Catherine Branch, were walking along a trail at the Brandon City Park. A man, wearing a ski mask and holding a gun, later identified as James David Fortenberry, appeared from the bushes and ordered them to get on the ground. He then forced Branch perform oral sex on him and then disappeared. A second assailant, later identified as Jeremy Holloway, Wilkerson's roommate, then appeared and also forced Branch to perform oral sex on him. He vaginally raped her and then forced her to perform oral sex a second time. After the assault, Wilkerson discouraged Branch from going to the police because the assailants had threatened them. He would not let Branch go home with him. Driving home, she decided to contact police. She was taken to the hospital and given a rape kit. Police went to Wilkerson's apartment to get a statement, but Holloway answered the door. He eventually gave permission to search his cell phone. There were several phone calls between Holloway, Fortenberry, and Wilkerson around the time of the assault. Police then obtained a warrant for Holloway's DNA, and Holloway gave consent to search his and Wilkerson's apartment. Police recovered a pistol inside a holster and a ski mask that Holloway admitted to using during the assault. Holloway gave a statement detailing how Wilkerson came up with a plan to make a fake rape scenario to get back at the victim for damaging his TV. He and Fortenberry were told to hide in the bushes and wait for Wilkerson and Branch to walk by. Holloway told police he felt the sex was consensual since Branch did not put up a fight. After his conviction and notice of appeal, Holloway filed a motion seeking a stay of the appeal and a remand of the case for consideration of an alleged *Brady* violation. The circuit court held a hearing, but found no *Brady* violation. He appealed.

HELD:(1) The circuit court did not abuse its discretion in excluding evidence of the victim's post-assault sexual activities with her boyfriend. The Court agreed the victim's post-assault sexual activities with her boyfriend were not relevant, and therefore not constitutionally required to be admitted. The victim's consenting behavior with her boyfriend could not be taken to mean that she consented to the defendant's sexual assault. The court also agreed with the circuit court's ruling that the probative value was outweighed by the prejudicial effect and would "tend to mislead…or confuse the jury."

(2) The circuit court did not abuse its discretion in excluding evidence that the victim attempted to prevent the case from proceeding. The court did not find it relevant that the victim desired to drop the criminal charges against her boyfriend and the defendant, because it did not make it more or less probable that the defendant did or did not rape her. The court noted it is ultimately the State's decision to prosecute and uphold the laws of the state.

(3) Holloway admitted to surprising victim while wearing a mask, holding a gun to her throat, and forcing her to perform oral sex on him. He also admitted to motioning with his gun for the victim to remove her pants and to having vaginal sex with her. Police secured a warrant for the defendant's DNA that matched the DNA that was swabbed from victim. Branch testified that she did not consent to the sexual-assault encounter. Additionally, she testified that during the assault, she did not know the identity of the two masked men who forced her to perform the sexual acts. The court noted that Holloway never stated that he identified himself to the victim during the assault.

(4) The *Brady* hearing addressed whether the defendant's neighbor, Chris Moore, gave an exculpatory oral and written statement to police that was never given to Holloway. According to Holloway, Moore overheard Branch recant her story, specifically stating that "it didn't happen." The circuit court

ultimately held that the credibility of the officer's testimony outweighed Moore's testimony. The circuit court found that the State did not possess an oral or written statement by Moore. It found that the defendant, by using reasonable diligence, could have obtained whatever information Moore gave to police, as he was listed as a potential witness in the police report.

(5) No cumulative error was found, because no error was found.

To read the full opinion, click here:
http://courts.ms.gov/Images/Opinions/CO107061.pdf

Jeffrey Lamont Durr v. State, No. 2014-KA-00968-COA (Miss.Ct.App. September 15, 2015)

CASE: Failure to Register as a Convicted Sex Offender
SENTENCE: 5 years as an habitual offender

COURT: Harrison County Circuit Court
TRIAL JUDGE: Hon. Lawrence Paul Bourgeois Jr.

APPELLANT ATTORNEY: George T. Holmes
APPELLEE ATTORNEY: Barbara Wakeland Byrd
DISTRICT ATTORNEY: Joel Smith

DISPOSITION: Affirmed. Lee, C. J., Irving and Griffis, P.J.J., Barnes, Ishee, Carlton, Fair, James, and Wilson, JJ., Concur

ISSUES: (1) Whether the trial court erred in excluding the police report, but allowing the detective's testimony about the address the defendant provided him, and (2) whether the evidence was sufficient.

FACTS: In 2003, Jeffrey Lamont Durr was convicted of aggravated assault and touching a child for lustful purposes. He was jailed from August 2003 to March 2008. He was required him to register as a sex offender under § 45-33-25. Five days after his release, Durr met with Jessica Akers, the sex-offender registrar for the Harrison County Sheriff's Department. Durr first registered his address as 1321 Joseph Avenue, Gulfport, his mother's home. Within a week, Akers determined the Joseph Avenue address noncompliant, as it was too close to a school. The defendant then moved in with his sister and registered using her address on Orange Court in Gulfport. He continued registering this compliant address until his probation was revoked, causing his incarceration from February 2009 until February 2012. When he was released in 2012, the defendant tried again to re-register using his mother's address. But Akers again told him that address was noncompliant. In the following months, the defendant did not submit a compliant address. In August 2012, he was arrested and indicted for felony failure to register as a sex offender. At trial, Durr insisted he had established his mother's residence and, thus, was "grandfathered in" before the school-proximity prohibition became law on July 1, 2006. However, when he was arrested in 2002, he gave an address in Long Beach as his residence. He and his mother maintained he never lived in Long Beach.

HELD: (1) The trial judge was correct to exclude the police report, but to allow the detective's testimony about the Long Beach address the defendant provided him in 2002. A typical police report

is hearsay and does not meet the business-records exception of MRE 803(6). However, the defendant's statement to the detective qualified as an admission by a party opponent.

(2) There was sufficient evidence to convict the defendant for failure to register as a sex offender. The State had to prove (1) the defendant was a resident of Harrison County, (2) he had been previously convicted of a sex offense requiring registration, and (3) he willfully, wantonly, and feloniously resided within 1,500 feet a school. The only question in dispute was whether he established his permanent residence at his mother's house before July 1, 2006. This was a question for the jury to determine.

To read the full opinion, click here:
http://courts.ms.gov/Images/Opinions/CO106250.pdf

September 22, 2015

Jimmy Shinn v. State, No. 2014-KA-00599-COA **(**Miss.Ct.App. September 22, 2015)

CASE: Motor Vehicle Theft
SENTENCE:10 years, with 3 years suspended and 3 years of PRS, and a fine of $1,000

COURT: Lowndes County Circuit Court
TRIAL JUDGE: Hon. Lee J. Howard

APPELLANT ATTORNEY: George Holmes, Hunter Nolan Aikens
APPELLEE ATTORNEY: Jeffrey A. Klingfuss
DISTRICT ATTORNEY: Forrest Allgood

DISPOSITION: Affirmed. Wilson, J., for the Court. Lee, C.J., Griffis, P.J., Barnes, Ishee, Carlton, Maxwell, Fair and James, JJ. Concur. Irving, P.J., not participating.

ISSUES: (1) Whether trial counsel provided ineffective assistance in three respects; by not requesting an instruction on petit larceny, not objecting to certain hearsay testimony, and not moving to dismiss the indictment on double jeopardy grounds, and (2) whether the trial court erred in sentencing Shinn according to the motor vehicle theft statute instead of the petit larceny statute.

FACTS: In January 2012, Walter Poole's 1983 brown Buick Century was stolen from his front yard. Poole reported the Buick as stolen, but later located it at a scrap yard in nearby Vernon, AL. After an investigation, it was determined that Kimberly Chain and Jimmy Shinn had taken the Buick from Poole's yard, towed it to Vernon, and sold it to the scrap yard for $250. Chain was interviewed and admitted to helping Shinn sell the car by using a fake name. Shinn claimed police pressured Chain into falsely implicating him in the crime. He was convicted and appealed.

HELD: The Court cannot adjudicate Shinn's ineffective assistance/double jeopardy claim on the present record and therefore dismissed that specific claim without prejudice to its inclusion in a properly filed motion for post-conviction relief. Otherwise, Shinn's claims are without merit.

(1) Shinn's counsel's decision not to request an instruction on petit larceny is not evidence of incompetence. At the time Shinn was tried, petit larceny was limited to thefts of personal property valued at less than $500, but the motor vehicle theft statute imposed no value requirement at all. Accordingly, there is no logical reason to believe that a jury would have convicted Shinn of petit larceny but not motor vehicle theft.

Shinn next claims that his trial counsel was ineffective because he failed to object to hearsay testimony from the detective relaying what the scrap yard employee told him, and what Chain told him when he first questioned her. His claim fails because his counsel's failure to object in these instances could have been done for strategic reasons and Shinn failed to show the outcome of his case would have been different had his counsel objected.

Although Shinn was first indicted in April 2012 for grand larceny under the same set of facts, the record reveals nothing more about its course of proceedings, disposition, or status of that charge at the time of trial in this case. For this reason, the Court simply cannot tell whether there was any basis for Shinn's lawyer to have moved to dismiss on double jeopardy grounds, and so it necessarily follows that the Court cannot determine whether his failure to do so constituted ineffective assistance.

(2) Shinn's indictment in this case clearly charged motor vehicle theft only and specifically referenced the appropriate Code section. The indictment was not ambiguous, so Shinn was appropriately sentenced for motor vehicle theft instead of petit larceny.

To read the full opinion, click here:
http://courts.ms.gov/Images/HDList/..%5COpinions%5CCO106788.pdf

Hubert O'Neal Fulton, Jr., v. State, No. 2014-KA-01493-COA (Miss.Ct.App. September 22, 2015)

CASE: Possession of Methamphetamine with intent
SENTENCE: 14 years, with 3 years suspended, and 3 years of PRS

COURT: Harrison County Circuit Court
TRIAL JUDGE: Hon. Michael H. Ward

APPELLANT ATTORNEY: Erin Elizabeth Pridgen
APPELLEE ATTORNEY: Billy L. Gore
DISTRICT ATTORNEY: Joel Smith

DISPOSITION: Affirmed. Wilson, J., for the Court. Lee, C.J., Irving and Griffis, P.JJ., Barnes, Ishee, Carlton, Maxwell, Fair and James, JJ. Concur.

ISSUES: (1) Whether Investigator Haley should not have been allowed to testify as an expert regarding narcotics sales and investigations; and (2) whether the evidence presented at trial was insufficient to sustain his conviction.

FACTS: On August 7, 2013, Captain Bruce Carver, Jr., of the Harrison County Sheriff's Office, and Officer Christopher Strong of the Ocean Springs PD were patrolling I-10 when they saw a car with

no license plate. They pulled the car over and asked the driver and sole occupant, Hubert Fulton, to get out of the car. Fulton complied, but both officers thought Fulton was acting suspiciously and when he got out of the car it appeared that he was trying to hide something. A sack containing methamphetamine– two large bags and four smaller ones, all marked with a tiger logo– and some additional empty bags were found under the car. A scale with meth residue was spotted in plain view in the driver's door panel. Additionally, at Fulton's request, over $2,000 in cash was recovered from the car's console. The trial judge allowed Investigator Matt Haley testify as an expert in the field of narcotics investigations. Haley, based on his experience, testified that meth users who are not dealers typically keep a gram or less of the drug for personal use. He further testified that digital scales are typically kept by dealers, not users. Finally, he testified that a lot of dealers use a "mark" or a "brand" on their bags like the tiger logo on the bags found in this case and that the items recovered—the scales, the amount of methamphetamine, the large amount of cash, and the small bags marked with logos—were generally "indicative [of] the distribution of methamphetamine." Fulton claimed he never had drugs in the car and, by coincidence, must have stopped on the side of the road where someone had left some drugs. Fulton was convicted and appealed.

HELD: (1) Fulton's challenge to Investigator Haley's testimony is without merit. In *Triplett v. State*, 814 So. 2d 158 (Miss. Ct. App. 2002), the Court held that the trial court did not abuse its discretion by permitting a law enforcement officer to testify as an expert on drug distribution because the officer "had been a member of narcotics task forces for years," "he had handled approximately 500 narcotics cases [over the prior decade], and he had attended numerous courses regarding drug trafficking." The experience and testimony of Investigator Haley are indistinguishable; (2) Sufficient evidence was presented to sustain the conviction.

To read the full opinion, click here:
http://courts.ms.gov/Images/HDList/..%5COpinions%5CCO106800.pdf

September 29, 2015

Demetrious Lawan Averett v. State, No. 2014-KA-00382-COA (Miss.Ct.App. September 29, 2015)

CASE: Burglary of a building
SENTENCE: 7 years in MDOC

COURT: Marion County Circuit Court
TRIAL JUDGE: Hon. Prentiss Greene Harrell

APPELLANT ATTORNEY: Daniel Hinchcliff and George T. Holmes
APPELLEE ATTORNEY: Lisa L. Blount
DISTRICT ATTORNEY: Haldon J. Kittrell

DISPOSITION: Affirmed. Barnes, J., for the Court. Lee, C.J., Griffis, P.J., Ishee, Carlton, Maxwell, Fair, James and Wilson JJ., Concur. Irving, P.J., Dissents Without Separate Written Opinion.

ISSUES: (1) Whether trial court erred in failing to declare a mistrial sua sponte when: (A) The State's witness impermissibly commented on Averett's failure to cooperate or give a statement and (B) The

prosecution commented during closing arguments regarding Averett's failure to provide officers with his alibi. Averett claims that each statement constituted a violation of his constitutional right to remain silent; (2) whether the evidence was insufficient to support the verdict; (3) whether Averett was denied the right to confront adverse witnesses; and (4) whether the trial court erred in allowing the State to comment on prior bad acts.

FACTS: On July 2, 2012, Marion County Deputy Sheriff Lon Ward was on patrol in Columbia, Mississippi, when he saw something run across Highway 13, several hundred yards in front of his patrol car. He heard an audible security alarm from the nearby Northside Package Store and noted that the glass door to the business was broken. Officer Richard Pack with the Columbia Police Department was dispatched to investigate. Surveillance video from the store revealed that two suspects, one male and one female, had thrown a cinder block through the front glass door of the store and stolen several bottles of liquor. The suspects were disguised in western-style hats and jackets. The following day, Officer Pack detained Shatner Lewis, a juvenile, for questioning regarding another investigation. Lewis stated that Jennifer Henderson told him that she and Demetrious Averett had broken into the liquor store. Based on Shatner's tip, law enforcement located Henderson walking down the road with a tote bag that contained a pint of Wild Turkey and was taken into custody. Henderson admitted she and Averett committed the burglary. Law enforcement recovered three bottles of whiskey from Henderson's sister's backyard that were buried in sand. A straw hat and a cloth bag were also discovered on a pathway leading from the rear of the home to the liquor store. Averett maintained his innocence and proceeded to trial. Henderson testified, and her family members also testified and corroborated her story. When asked if evidence linked Averett to the crime, Officer Mike Cooper stated, "No, sir, he wouldn't provide a statement or wouldn't give any kind of cooperation." Averett testified on his own behalf, claiming that the State's witnesses were lying, as he was at Joshodrick Rawls's house that evening. Rawls also testified that Averett was with him that evening. The State commented during its closing argument: "You heard Officer Cooper say when he picked [Averett] up, he refused to cooperate. That would have been a fine time to tell somebody something."

HELD: (1) Defense counsel made no contemporaneous objection to either statement at trial, therefore the right to bring this claim on appeal is waived, unless plain error is found. (A) Consistent with precedent the Court finds the comment made by Officer Cooper during cross-examination by the defense, and prior to Averett's testimony, did not constitute plain error. (B) the State's comment failed to create unjust prejudice against Averett resulting in a decision influenced by prejudice. Under some circumstances, reversal is not required, even though the prosecutor asked questions about the defendant's post-arrest silence. Such a circumstance, as in this case, is when the evidence weighs overwhelmingly against the defendant.

(2) The evidence was sufficient to support the verdict. Henderson testified that she committed the crime with Averett. Lewis said that Henderson admitted to him that she and Averett had robbed the package store. There was ample testimony to support Henderson's version of the events. Her family members who testified said they saw Averett with Henderson that evening. Furthermore, some of the stolen liquor bottles were found in the backyard of Averett's sister, and a straw hat was found in the woods leading to her house – physical evidence that corroborated Henderson's statement and testimony.

(3) Averett refers to a police report filled out by Officer Herbert Crocroft, in which he recounted an interview with Lloyd Rivett, one of the package-store owners. Neither person testified at trial. Averett's argument is that because the State brought the burglary charge based on this report, it was testimonial in nature. However, this report was never entered into evidence at trial. Therefore, there is no merit to this issue.

(4) The Court finds that Averett "opened the door" during direct examination and there was no error in the trial court's ruling to allow the State's questions.

To read the full opinion, click here:
http://courts.ms.gov/Images/HDList/..%5COpinions%5CCO106844.pdf

Malcolm Cameron v. State, No. 2014-KM-01802-COA (Miss.Ct.App. September 29, 2015)

CASE: DUI first offense, and Careless Driving
SENTENCE: 48 hours suspended for 2 years and a $50 fine

COURT: Madison County Circuit Court
TRIAL JUDGE: Hon. John Huey Emfinger

APPELLANT ATTORNEY: Kevin Dale Camp and Jared Keith Tomlison
APPELLEE ATTORNEY: None
CITY PROSECUTOR: Boty McDonald

DISPOSITION: Affirmed. Maxwell, J., for the Court. Lee, C.J., Irving and Griffis, P.JJ., Barnes, Ishee, Carlton, Fair, James and Wilson JJ., Concur.

ISSUES: (1) Whether there was probable cause for the traffic stop; and (2) Whether there was insufficient evidence to support his DUI conviction.

FACTS: On March 16, 2013, Officer Ryan Ainsworth received a call from dispatch that a complainant reported a GMC Sierra truck driving carelessly. Officer Ainsworth first saw the truck in a McDonald's drive thru. After Cameron went through the drive-thru, he turned right onto the highway and as Officer Ainsworth followed Cameron, he noticed his truck swerve to the left, so he pulled Cameron over. Ainsworth immediately "observed the overwhelming odor of an intoxicating beverage emitting from within the vehicle." He also noticed Cameron's eyes were "bloodshot and glassy." Cameron failed a preliminary breath test, so Officer Ainsworth conducted a variety of field sobriety tests. Cameron exhibited several indicators of intoxication on these tests as well. Cameron was arrested and later refused to blow hard enough into the intoxilyzer to register a result. After pleading nolo contendere in municipal court, Cameron appealed to county court, which held a de novo trial on the two charges. Officer Ainsworth was the only person to testify. The videos of the traffic stop and the observation room were also admitted. After being found guilty again, Cameron appealed to the circuit court, which affirmed.

HELD: (1) Cameron argues for the first time on appeal that there was no probable cause for the traffic stop and therefore the issue is procedurally barred. Notwithstanding the bar, Cameron's lack-

of-probable-cause argument fails because the officer saw Cameron's truck "veer to the left side of the roadway" thereby occupying both the eastbound and westbound lanes of the road. Therefore, probable cause existed to stop Cameron and there was no Fourth Amendment violation warranting suppression of the evidence.

(2) The evidence was sufficient to show Cameron drove under the influence of alcohol. In addition to seeing Cameron swerve while driving, which was confirmed by video, after stopping Cameron, the officer smelled an overwhelming odor of alcohol and noticed his eyes were glassy and bloodshot. The results of the field sobriety tests also indicated intoxication.

To read the full opinion, click here:
http://courts.ms.gov/Images/HDList/..%5COpinions%5CCO106890.pdf

Tracy Woods v. State, No. 2014-KM-01807-COA (Miss.Ct.App. September 29, 2015)

CASE: DUI first offense, and Failure to Signal
SENTENCE: 48 hours suspended, successful completion of 2 years of probation, and a $950 fine

COURT: Madison County Circuit Court
TRIAL JUDGE: Hon. John Huey Emfinger

APPELLANT ATTORNEY: Kevin Dale Camp and Jared Keith Tomlison
APPELLEE ATTORNEY: None
CITY PROSECUTER: Boty McDonald

DISPOSITION: Affirmed. Maxwell, J., for the Court. Lee, C.J., Irving and Griffis, P.JJ., Barnes, Ishee, Carlton, Fair, James and Wilson JJ., Concur.

ISSUES: (1) Whether the officer who pulled Woods over lacked probable cause to do so, making the evidence against him inadmissible.

FACTS: On the night of November 21, 2011, Woods turned left off Lake Harbor Drive onto Old Canton Road in Ridgeland, Mississippi. Ridgeland Police Officer Ryan Ainsworth saw Woods veer out of his lane when making the left turn. Woods then made a sharp right into a gas station without signaling. Officer Ainsworth pulled into the gas station behind Woods. The officer smelled alcohol on Woods and noticed that his eyes were glassy. Woods admitted to drinking two beers and blew a .18% on a breath test. He pled nolo contendere in municipal court. He then appealed to the County Court of Madison County, which tried the two charges de novo. He was convicted again. And he appealed again to the Circuit Court of Madison County, which affirmed. Woods next appealed to the COA.

HELD: (1) The circumstances supported Officer Ainsworth having an objective, reasonable basis to believe Woods violated §63-3-707 by turning without giving the proper signal. Thus, the traffic stop was reasonable, meaning the exclusionary rule does not apply.

To read the full opinion, click here:

http://courts.ms.gov/Images/HDList/..%5COpinions%5CCO106891.pdf

Stewart Chase Vaughn v. State, No. 2014-KA-00266-COA (Miss.Ct.App. September 29, 2015)

CASE: Sale of Methamphetamine
SENTENCE: 60 years to serve as a habitual offender and a subsequent drug offender

COURT: Madison County Circuit Court
TRIAL JUDGE: Hon. John Huey Emfinger

APPELLANT ATTORNEY: Daniel Hinchcliff
APPELLEE ATTORNEY: Billy L. Gore
DISTRICT ATTORNEY: Michael Guest

DISPOSITION: Affirmed. Irving, P.J., for the Court. Lee, C.J., Griffis, P.J., Ishee, Carlton, Maxwell, Fair and Wilson JJ., Concur. Barnes, J., Concurs in Part and in the Result Without Separate Written Opinion, James, J., Concurs In Part Without Separate Written Opinion.

ISSUES: (1) Whether the circuit court erred in failing to sua sponte enforce its pre-trial ruling precluding the admission of hearsay statements. More specifically, Vaughn argues: (A) The circuit court should have excluded Denton's testimony because there was a lack of physical evidence showing that the person Denton called prior to the "bust buy" was Vaughn or that Vaughn was the individual who sold the methamphetamine to Denton; (B) He insists that Investigator Raymond Duke's testimony regarding Brewer's initial statement constituted inadmissible hearsay because when Brewer provided her initial statement, she was implicated in a crime; (C) He argues that Investigator Duke's testimony regarding Brewer's initial statement violated the principle set forth in *Crawford v. Washington*, 541 U.S. 36 (2004), because Vaughn was not given an opportunity to cross-examine Brewer; and (D) He argues that any reference to Brewer's statements was prohibited by the circuit court's ruling on his motion to suppress.

(2) Whether the amendment of the indictment prejudiced his defense because the circuit court's plea date passed before the State moved to amend the indictment to charge Vaughn as a habitual offender, because the State did not provide him with adequate notice of the motion to amend, and because based on his belief that the State would not charge him as a habitual offender, he rejected plea-bargain offers made by the State.

FACTS: On November 8, 2012, Stewart Vaughn, during a "bust buy," sold approximately three grams of methamphetamine to James Denton, a confidential informant working with the Rankin County Sheriff's Department. Denton purchased the drugs with marked cash. During the early morning of November 9, 2012, officers arrested Vaughn and his companion, Tammy Brewer, as Vaughn and Brewer were traveling in a sedan driven by Brewer. Following her arrest, Brewer, in response to questioning, informed investigators that Vaughn had thrown cash from the front-passenger-side window of the sedan. During a subsequent video-recorded interrogation session, Brewer repeated her initial statement. After the interrogation, investigators found the cash along the side of the road. After his indictment, the State filed a motion to amend to charge him as a habitual offender. Without an objection, the circuit court granted the amendment, and the case went to trial

on October 28, 2013. Prior to trial, the circuit court granted Vaughn's Motion to Suppress as to Brewer's recorded statement but withheld its ruling on the admissibility of the remaining evidence. The court informed Vaughn that, during trial, he could renew his motion to suppress or object to the introduction of that evidence. At trial, Denton testified he was arrested for possession of methamphetamine. He also testified that following his arrest, he met with Detective Brett McAlphin, who asked him to arrange the "bust buy" with Vaughn. Denton admitted that he agreed to do so in order to avoid criminal charges. He further testified to the details of the "bust buy" with Vaughn. Also, Investigator Raymond Duke testified about his investigation which included his interrogation of Brewer. Brewer did not testify. Vaughn was convicted and appealed.

HELD: (1) The circuit court did not err: (A) Vaughn failed to raise an objection during Denton's testimony and Vaughn additionally failed to identify any hearsay statements made by Investigator Duke during his testimony; (B) While it clearly can be inferred from Duke's testimony that he learned from Brewer that someone threw something from the car, it cannot be legitimately argued that Duke testified that Brewer told him that Vaughn tossed something from the car; (C) Investigator Duke's testimony that he learned from Brewer that some items were thrown out the window of the car was offered into evidence to explain why the officers searched the area near the location of the arrest, not to prove the truth of Brewer's statement. Therefore, accepting Vaughn's argument that a fair construction of Investigator Duke's testimony is that Brewer told officers that Vaughn threw some items out of the car, the Court still finds no *Crawford* (Confrontation Clause) violation because the statement was not offered to prove that Vaughn threw the items out of the window; and (D) Vaughn misread the court's pretrial ruling. The trial court said nothing about the admissibility of Brewer's initial statement that led to the search. The court specifically advised defense counsel that he was "free to object to anything that [came] up during the course of the trial that [he] believe[d] [was] inappropriate." As noted, Vaughn failed to do so.

(2) The circuit court did not err. In *Gowdy v. State*, 56 So. 3d 540 (Miss. 2010), the Mississippi Supreme Court held that the trial court erred in "allowing the State to amend the indictment after [the defendant had been] convicted," but here the indictment was amended two months before trial and is therefore distinguishable from *Gowdy.* Also, Vaughn offered no evidence to support his argument that the amendment prejudiced his defense, as the motion to amend clearly set forth Vaughn's prior convictions, and he was afforded an adequate opportunity to prepare, and he failed to establish that he refused plea offers based upon his belief that the State would not charge him as a habitual offender.

To read the full opinion, click here:
http://courts.ms.gov/Images/HDList/..%5COpinions%5CCO107269.pdf

COA POST-CONVICTION CASES

April 14, 2015

Kerry L. Morgan v. State, No. 2013-CP-02035-COA (Miss.Ct.App. April 14, 2015)

CASE: PCR – Burglary and Aggravated Assault of a LEO (habitual offender)
SENTENCE: 30 years but placed under a term of 28 years and 11 months of PRS

COURT: Yalobusha County Circuit Court
TRIAL JUDGE: Hon. James McClure, III

APPELLANT ATTORNEY: Kerry L. Morgan (Pro Se)
APPELLEE ATTORNEY: Melanie Dotson Thomas

DISPOSITION: Dismissal of PCR Affirmed. Fair, J., for the Court. Lee, C.J., Irving and Griffis, P.JJ., Barnes, Ishee, Carlton, Maxwell and James, JJ., Concur. Roberts, J., Specially Concurs with Separate Written Opinion, Joined by Lee, C.J., Griffis, P.J., and Fair, J.

ISSUES: (1) Whether the PCR was procedurally barred, and (2) where the sentence was legal.

FACTS: Kerry Morgan pled guilty in 2004 to burglary and aggravated assault of a LEO. He was sentenced to 30 years but placed under a term of 28 years and 11 months of PRS. Morgan was subsequently arrested for forgery. A hearing was held in March of 2005, at which the State put on evidence showing that Morgan committed four instances of forgery in November of 2004. Specifically, Morgan was accused of forging checks belonging to his stepfather and attempting to use them at several businesses. As a result, his post-release supervision was revoked. Morgan filed a PCR which was denied. The COA affirmed on appeal. *Morgan v. State*, 995 So. 2d 787 (Miss. Ct. App. 2008). Morgan filed a second PCR in 2012, arguing his sentence was illegal on its face, therefore his PCR was not successive writ barred. He claimed he was illegally sentenced as an habitual offender. The trial found the PCR time barred and successive writ barred, but also found the claim without merit. Morgan appealed.

HELD: (1) Morgan's claim as to the legality of his sentence is exempt from the procedural bar. (2) Morgan's indictment, his petition to enter a guilty plea, numerous statements during the plea colloquy, and the sentencing order all state that Morgan was convicted and sentenced as a habitual offender. His sentence did not conform to the habitual offender statute, as it should not have been suspended. Nonetheless, even though Morgan's sentence did not conform to the statute, its failure is that it was too lenient. Any such error is thus harmless.

> We take this opportunity to state that, while we recognize that the trial courts may deviate from the statute in exceptional circumstances if it is constitutionally required, the laws of our State should not be casually disregarded as a matter of day-to-day plea bargaining, as appears to have happened here.

Roberts, J., Specially Concurring:

Judge Roberts wrote again about his concern with illegally lenient habitual offender sentences. Morgan's sentence to PRS as a habitual offender violates the mandate that a habitual offender's maximum sentence cannot be reduced or suspended, or subject to probation or parole. It was unlawful. Although he concurred in the majority opinion, for Morgan to have received PRS is a violation of the public policy of this State. His sentence should be voided and his case remanded for trial.

To read the full opinion, click here:

http://courts.ms.gov/Images/Opinions/CO102168.pdf

Brian Sweet v. State, No. 2014-CP-00514-COA (Miss.Ct.App. April 14, 2015)

CASE: PCR – Capital Murder
SENTENCE: Life w/o Parole

COURT: Hinds County Circuit Court
TRIAL JUDGE: Hon. Winston L. Kidd

APPELLANT ATTORNEY: Brian Sweet (Pro Se)
APPELLEE ATTORNEY: Stephanie Breland Wood

DISPOSITION: Dismissal of PCR Affirmed. Griffis, P.J., for the Court. Lee, C.J., Irving, P.J., Barnes, Ishee, Roberts, Carlton, Maxwell, Fair and James, JJ., Concur.

ISSUE: Whether the circuit court erred in summarily dismissing Sweet's PCR.

FACTS: On August 16, 2007, Brian Sweet, Craig Sweet, and Carl Hollins were indicted for the capital murder and kidnapping of Deshun Lynell Vaughn. On January 19, 2010, Sweet entered a guilty plea and was sentenced to serve life in prison without the possibility of parole .On January 13, 2014, Sweet filed a PCR claiming he pled guilty under a defective indictment. The circuit court dismissed the PCR and Sweet appealed.

HELD: The PCR is time barred. Sweet's indictment was sufficient to charge him with capital murder. The alleged defect was waived with the plea.

To read the full opinion, click here:
http://courts.ms.gov/Images/Opinions/CO101829.pdf

Samuel Lee Thomas v. State, No. 2013-CP-00708-COA (Miss.Ct.App. April 14, 2015)

CASE: PCR – Business Burglary and Burglary of an Automobile
SENTENCE: 5 years on each count consecutively as an habitual offender

COURT: Harrison County Circuit Court
TRIAL JUDGE: Hon. John C. Gargiulo

APPELLANT ATTORNEY: Samuel Lee Thomas (Pro Se)
APPELLEE ATTORNEY: Stephanie Breland Wood

DISPOSITION: Dismissal of PCR Affirmed. Irving, P.J., for the Court. Lee, C.J., Griffis, P.J., Barnes, Ishee, Roberts, Carlton, Maxwell, Fair and James, JJ., Concur.

ISSUE: Whether the circuit court erred in dismissing Thomas's PCR as time barred.

FACTS: On April 13, 2009, Samuel Lee Thomas pled guilty to a two count indictment for business burglary. One count involved the burglary of Spee Dee Oil Change and the other count involved breaking into a car located at the oil change business. On December 27, 2012, Thomas filed a PCR alleging that his sentences were illegal, violating his rights against double jeopardy. The circuit court dismissed the PCR and Thomas appealed.

HELD: Thomas argued that he was punished twice for the same offense because he was convicted of two counts of burglary, but he only committed burglary at one location. However, business burglary and burglary of an automobile require different evidence to prove the elements for each charge. It matters not that the automobile was located inside the oil change business. The owner of the car was different than the owner of the business. The trial judge did not err in finding the sentence was legal and Thomas was not exempt from the time bar.

To read the full opinion, click here:
http://courts.ms.gov/Images/Opinions/CO103023.pdf

Gregory Kendall Allen, Jr. v. State, No. 2014-CP-00326-COA (Miss.Ct.App. April 14, 2015)

CASE: PCR – Sexual Battery x2
SENTENCE: Two concurrent 25 year sentences, with 13 years to serve and 12 years of PRS

COURT: Jackson County Circuit Court
TRIAL JUDGE: Hon. Kathy King Jackson

APPELLANT ATTORNEY: Gregory Kendall Allen Jr. (Pro Se)
APPELLEE ATTORNEY: Stephanie Breland Wood

DISPOSITION: Dismissal of PCR Affirmed and Remanded for Correction of the Original Sentencing Order. Irving, P.J., for the Court. Lee, C.J., Griffis, P.J., Barnes, Ishee, Roberts, Carlton, Maxwell, Fair and James, JJ., Concur.

ISSUE: Whether the trial court erred in summarily dismissing Allen's PCR.

FACTS: Allen was charged with two counts of sexual battery for vaginally and anally penetrating his six-year-old half-sister. He was also charged with one count of touching a child for lustful purposes. He entered an agreement with the State, wherein he agreed to plead guilty to the two counts of sexual battery, and the State agreed to dismiss Count III—the charge of touching a child for lustful purposes. He subsequently filed a PCR, mainly claiming that he could not be charged for fondling because he was not over 18. The PCR was summarily dismissed and Allen appealed.

HELD: While it is true that Allen's original multi-count indictment included the fondling charge, the court dismissed this charge in light of the statute's age requirement, leaving Allen facing only two counts, both being sexual battery. However, for some unexplained reason, when the sentencing order was entered a few days later, it provided that Allen had been convicted of not only the two counts of sexual battery, but also Count III—touching a child for lustful purposes—and was being sentenced

for all three counts. The rest of Allen's claims (speedy trial and ineffective assistance) were waived by the guilty plea.

"In light of the error committed here, we remand this case for the circuit court to correct the sentencing order to accurately reflect Allen's convictions and sentences."

To read the full opinion, click here:
http://courts.ms.gov/Images/Opinions/CO103024.pdf

April 21, 2015

Robert M. Massey a/k/a Matt Massey v. State, No. 2014-CP-00329-COA (Miss.Ct.App. April 21, 2015)

CASE: PCR – Sexual Battery
SENTENCE: 30 years with 17 years suspended upon the successful completion of 4 years PRS and successful completion of an assigned community-service program

COURT: Jones County Circuit Court
TRIAL JUDGE: Hon. Billy Joe Landrum

APPELLANT ATTORNEY: Robert M. Massey (Pro Se)
APPELLEE ATTORNEY: Melanie Dotson Thomas

DISPOSITION: Denial of PCR Affirmed. James, J., for the Court. Lee, C.J., Griffis, P.J., Barnes, Ishee, Roberts, Carlton, Maxwell and Fair, JJ., Concur. Irving, P.J., Concurs in Part and in the Result Without Separate Written Opinion.

ISSUE: Whether Massey's sentence exceeded the statutory maximum.

FACTS: On March 14, 2008, Robert M. Massey pled guilty to sexual-battery. On January 1, 2014, Massey filed a petition to clarify his sentence, which the trial court treated as a PCR. Massey argued that his sentence of 4 years of PRS violated the maximum sentence of 30 years under §97-3-95(1)(c). The trial court confirmed that the four-year term of post-release supervision is a condition of the suspended seventeen years of Massey's sentence and denied relief. Massey appealed.

HELD: First, Massey's PCR is not time barred since he is challenging the legality of his sentence. Second, Massey's successful completion of PRS is a condition of the 17 years of suspended time. Likewise, the successful completion of the community-service program is a condition of the 17 years suspended, and is inherent in the suspended time. Massey's four years of post-release supervision and community service are not in addition to the 17 years suspended but are included in the 17 years. Massey is not at risk of serving more than the statutory maximum of 30 years.

To read the full opinion, click here:
https://courts.ms.gov/images/Opinions/CO102523.pdf

James Thomas v. State, No. 2013-CA-02008-COA (Miss.Ct.App. April 21, 2015)

CASE: PCR – Sexual Battery
SENTENCE: 27 years

COURT: Oktibbeha County Circuit Court
TRIAL JUDGE: Hon. Lee J. Howard

APPELLANT ATTORNEY: Jim Davis
APPELLEE ATTORNEY: Lisa L. Blount

DISPOSITION: Denial of PCR Affirmed. Lee, C.J., for the Court. Irving and Griffis, P.JJ., Barnes, Ishee, Roberts, Carlton, Maxwell, Fair and James, JJ., Concur.

ISSUES: (1) Whether there was a factual basis to support his plea, (2) whether his plea was involuntary, (3) whether he met his burden of proof, (4) whether his counsel was ineffective, and (5) whether trial courts have a duty to inform criminal defendants of their parole eligibility before accepting pleas.

FACTS: On April 17, 2012, James D. Thomas entered an open guilty plea to sexual battery of his 11 year old granddaughter, and was sentenced to 27 years. A year later, Thomas filed a PCR. After an evidentiary hearing, the trial court denied relief. He appealed.

HELD: (1) Thomas claimed there was no evidence of penetration to support a sexual battery charge. However, Thomas agreed with the charges as laid out in the indictment which included penetration of the victim. The State's factual basis also included that Thomas admitted "licking" the victim's vagina. This was sufficient to show cunnilingus. Although the victim never stated Thomas penetrated her, an 11 year old can not be expected to understand the definition of cunnilingus.

(2) and (3) Thomas argued his plea was involuntary because his counsel misinformed him regarding his parole eligibility. Thomas claimed at the evidentiary hearing and through his affidavit, and the affidavits of his wife and daughter, that his lawyer stated that he would receive between 2 and 4 years and would probably be released after sentencing.

However, at the plea colloquy, the trial court asked Thomas if he understood that it must sentence him to no less than 20 years nor more than life imprisonment, to which he answered yes. The minimum and maximum sentences were also listed in the plea petition. His trial counsel also testified that no guarantees were made to Thomas regarding his sentence. He denied telling family members the worst he would get was 7 years. The trial judge's findings were not clearly erroneous

(4) Thomas also argued that because he was misinformed regarding his parole eligibility, he received ineffective assistance of counsel. Having found that the trial court did not err in finding that Ray did not misinform Thomas regarding his parole eligibility, Ray's performance was not deficient.

(5) The law is well settled that a trial court is not required to inform a defendant of parole eligibility.

To read the full opinion, click here:
https://courts.ms.gov/images/Opinions/CO102072.pdf

April 28, 2015

Curtis Davis, Jr. v. State, No. 2014-CP-00088-COA (Miss.Ct.App. April 28, 2015)

CASE: PCR – Manslaughter and Possession of a Firearm by a Convicted Felon
SENTENCE: 20 years for the manslaughter and a consecutive 10 years for the weapons charge

COURT: Montgomery County Circuit Court
TRIAL JUDGE: Hon. C.E. Morgan, III

APPELLANT ATTORNEY: Curtis Davis, Jr. (Pro se)
APPELLEE ATTORNEY: Billy L. Gore

DISPOSITION: Denial of PCR Affirmed. Roberts, J., for the Court. Lee, C.J., Griffis, P.J., Ishee, Carlton, Maxwell and Fair, JJ., Concur. Irving, P.J., and Barnes, J., Concur in Part and in the Result Without Separate Written Opinion. James, J., Concurs in Part Without Separate Written Opinion.

ISSUES: (1) Whether the trial court erred in denying his PCR when there was newly discovered exculpatory evidence; (2) whether the trial court erred in finding his PCR successive-writ barred; (3) whether his attorney was ineffective for failing to advise him of his right to wait on the DNA results; and (4) whether his due-process rights were violated because the State failed to disclose the DNA test results.

FACTS: On August 31, 2010, Curtis Davis pled guilty to manslaughter and possession of a firearm by a convicted felon after he was initially indicted for capital murder of his father-in-law, William McCuiston. On May 24, 2011, Davis's counsel filed a PCR asserting that Davis's conviction and sentences should be vacated based on newly discovered DNA evidence. The trial court denied the motion, finding Davis's arguments either had been waived or were without merit. The court noted the DNA results were available 4 days prior to his plea. His plea waived this issue. The trial court also found that the absence of DNA evidence did not exonerate Davis. Davis did not appeal this ruling. On October 10, 2012, Davis filed a pro se petition entitled "Writ of Mandamus," which the trial court treated as a PCR. Davis again argued he was entitled to relief based on his discovery of the DNA test results after his plea. He claimed the DNA results were newly discovered evidence, his counsel was ineffective for failing to advise him that he could wait on the DNA test results before pleading guilty, and his confession was coerced. The trial court denied the motion as successive-writ barred, and Daivs appealed.

HELD: (1) and (2) As the trial court found when it denied Davis's first PCR, the DNA results do not qualify as newly discovered evidence, and they are not material to the outcome of Davis's conviction. The DNA test results were available prior to Davis's plea and were not suppressed by the State. Davis confessed to law enforcement that he killed McCuiston. By pleading guilty, Davis nullified any assertion that he could somehow later prove his innocence through undiscovered evidence. Davis has

not shown a claim of newly discovered evidence such that he can overcome the successive-writ procedural bar.

(3) Davis's argument that his counsel coerced him into pleading guilty without waiting on the DNA test results is without merit. Davis has provided no evidence his attorney gave him erroneous advice. Davis has not shown ineffectiveness on behalf of his counsel and has not overcome the procedural bar.

(4) The State did not commit a *Brady* violation. Davis moved to compel the DNA test results prior to his plea. Crime lab records show the DNA results became available four days prior to Davis's plea. There is no evidence that the test results were not available to Davis, or that the State suppressed the test results. And even if there was, Davis has failed to show the evidence was favorable to his defense. The DNA test results only excluded Davis as a contributor to the samples taken and were not exculpatory.

To read the full opinion, click here:
https://courts.ms.gov/images/Opinions/CO102968.pdf

James Douglas Smith v. State, No. 2014-CP-00183-COA (Miss.Ct.App. April 28, 2015)

CASE: PCR – Statutory Rape of a Child under 14
SENTENCE: 30 years

COURT: Winston County Circuit Court
TRIAL JUDGE: Hon. C.E. Morgan, III

APPELLANT ATTORNEY: James Douglas Smith (Pro Se)
APPELLEE ATTORNEY: Laura Hogan Tedder

DISPOSITION: Denial of PCR Affirmed. Roberts, J., for the Court. Lee, C.J., Irving and Griffis, P.JJ., Barnes, Ishee, Carlton, Maxwell, Fair and James, JJ., Concur.

ISSUES: (1) Whether the trial judge erred in finding the PCR time barred, (2) whether his guilty plea was voluntary, and (3) whether his 30 year sentence was illegal because it exceeded his life expectancy.

FACTS: On August 8, 2009, James Smith pled guilty to having sexual relations with a minor, D.B., against her will, at a time when the victim was under the age of fourteen and he was over the age of eighteen. He was sentenced to 30 years. On August 10, 2013, Smith filed a PCR, claiming his plea was coerced and his sentence illegally exceeded his life expectancy. The trial judge dismissed his petition as time barred and Smith appealed.

HELD: (1) Since Smith alleged his sentence was illegal, the PCR is not time barred. (2) At his plea hearing, Smith stated he understood he could receive anything between 20 years and life. Smith indicated he was pleading guilty but was innocent. The judge did not want to take his plea. The DA indicated Smith confessed and the State had DNA evidence linking him to the victim. Smith then

stated he was in fact guilty. He stated he understood the State's recommendation was 30 years. The plea was voluntary.

(3) Smith alleges that his thirty-year sentence for statutory rape is unlawful because it is equivalent to life imprisonment. Smith pled guilty under §97-3-65(3)(c), which provides for punishment as the court determines of between 20 years and life. The judge's determination of Smith's sentence was well within his statutorily defined discretion and did not exceed the statutory limits.

To read the full opinion, click here:
https://courts.ms.gov/images/Opinions/CO102974.pdf

Derrick Newell v. State, No. 2013-CA-01652-COA (Miss.Ct.App. April 28, 2015)

CASE: PCR – Conspiracy to commit Armed Robbery
SENTENCE: Life w/o parole as an habitual offender

COURT: Walthall County Circuit Court
TRIAL JUDGE: Hon. David H. Strong Jr.

APPELLANT ATTORNEY: Will McIntosh, David I. Megdell
APPELLEE ATTORNEY: Lisa L. Blount

DISPOSITION: Denial of PCR Affirmed. Ishee, J., for the Court. Lee, C.J., Griffis, P.J., Barnes, Roberts, Carlton, Maxwell, Fair and James, JJ., Concur. Irving, P.J., Dissents Without Separate Written Opinion.

ISSUE: Whether petitioner's acquittal for the crimes of armed robbery, aiding and abetting, and accessory after the fact, barred the State from indicting and prosecuting him for conspiracy to commit armed robbery under a double-jeopardy theory.

FACTS: In September of 1997, Derrick Newell, along with Carlos Craft and Temus Magee, conspired to rob David Cooley. Newell drove the car and waited outside while the others went into Cooley's house, held a gun to his head and robbed him. Newell then drove them away and split the money with them. Both of the other conspirators testified against Newell. Prior to Newell's trial for conspiracy to commit armed robbery, he was tried, along with Craft, for the crimes of armed robbery, aiding and abetting, and accessory after the fact. He was acquitted of those charges. The State then proceeded to trial on a conspiracy charge and Newell was convicted. The conviction was affirmed on appeal. *Newell v. State*, 754 So. 2d 1261 (Miss. Ct. App. 1999). He was sentenced to life without parole as an habitual offender. The SCT finally granted his third application for post-conviction relief, and allowed him to file in the trial court. However, the trial court denied relief, finding the jury was never asked to determine whether Newell committed the crime of conspiracy in his first trial. The court denied relief and Newell appealed.

HELD: The charges of armed robbery, aiding and abetting, and accessory after the fact were based on events occurring immediately prior to, during, and immediately after the robbery. The charge for conspiracy to commit armed robbery was based on a conversation that took place an entire day before

the robbery occurred. This conspiracy was not previously placed before the jury. Although there was a discussion during a hearsay objection where Newell's status as a "co-conspirator" was discussed, it was in the context of the hearsay question only.

It is clear that the jury was only asked to determine whether Newell was guilty of armed robbery, aiding and abetting, and accessory after the fact. The jury was never told that conspiracy was alleged, and they were never presented with the elements of conspiracy or any evidence regarding the crime of conspiracy. "Newell's contention that the crime of conspiracy to commit armed robbery was presented to the jury and subsequently dismissed by the jury in Newell's first trial such that double jeopardy and collateral estoppel would attach is unfounded."

To read the full opinion, click here:
https://courts.ms.gov/images/Opinions/CO103340.pdf

May 5, 2015

Johnnie Wheeler v. State, No. 2014-CP-00294-COA (Miss.Ct.App. May 5, 2015)

CASE: PCR – Murder
SENTENCE: Life

COURT: Lincoln County Circuit Court
TRIAL JUDGE: Hon. Michael M. Taylor

APPELLANT ATTORNEY: Johnnie Wheeler (Pro Se)
APPELLEE ATTORNEY: Laura Hogan Tedder

DISPOSITION: Denial of PCR Affirmed. Carlton, J., for the Court. Irving, P.J., Barnes, Ishee and James, JJ., Concur. Roberts, J., Dissents with Separate Written Opinion, Joined by Lee, C.J., Griffis, P.J., Maxwell and Fair, JJ.

ISSUES: (1) Whether his due process was violated because a clerical error existed regarding his name and birth date; (2) whether the parole board denied him a preliminary revocation hearing; and (3) whether the trial court failed to provide him notice of the date of his evidentiary hearing on his PCR.

FACTS: Johnnie Wheeler pled guilty on January 15, 2013, to felony shoplifting while on parole for a 1970 murder conviction. He was sentenced to serve 5 years, with the balance suspended for time served, and with 4 years PRS. His parole was subsequently revoked. On January 31, 2013, Wheeler filed a petition for a writ of habeas corpus, asserting that his right to due process was violated because he did not participate in a preliminary hearing before the parole board. Wheeler also claimed that he was convicted for felony shoplifting under the wrong name. The trial court treated this as a PCR and denied relief after an evidentiary hearing. Wheeler appealed.

HELD: (1) There were some clerical errors in his indictment, but those were waived by Wheeler's guilty plea. With respect to his claim of a lack of sufficient due process in the revocation of his

parole, §47-7-27 provides that any offender convicted of a felony while on parole shall immediately have his parole revoked upon presentment of a certified copy of the commitment order to the board.

(2) Wheeler contends that a parole officer held Wheeler in jail after he was sentenced for his felony-shoplifting conviction, and then transported Wheeler to the penitentiary without a preliminary hearing. However, once Wheeler was convicted of felony-shoplifting, the parole violation was then established. No error occurred and no federal or state right was violated by the revocation of Wheeler's parole upon Wheeler's conviction.

Wheeler offered no evidence he exhausted administrative remedies for his claims that his sentence was improperly calculated. While the trial court possessed jurisdiction over Wheeler's PCR, alleging unlawful revocation of his parole based on the sufficiency of due process in the revocation proceedings, the trial court lacked jurisdiction on matters of sentence calculation.

(3) Wheeler claimed that the trial court failed to provide him with notice that the date of his evidentiary hearing had moved from September 16th to September 23rd. Wheeler claimed this surprised him and prejudiced his defense, as he lacked the ability to call witnesses; that his attorney attended the hearing but did not speak; and that his parole officer failed to attend the hearing. However, the trial court found no prejudice. Wheeler never requested a continuance.

Roberts, J., Dissenting:

Judge Roberts would not merely affirm the summary dismissal, but would dismiss for lack of jurisdiction. Judge Roberts believed Wheeler was attacking his murder conviction, so therefore needed permission before filing a PCR.

> When a petitioner such as Wheeler makes such a claim, our PCR statutes simply make no exception to the requirement that he first obtain permission from the supreme court to file. Since it is clearly undisputed that Wheeler was on parole for life when he committed and pleaded guilty to felony shoplifting and that the parole board revoked his parole upon proof of such conviction and status, I am confident that the supreme court would have denied him leave to file in the trial court and this Court would not be tasked with writing these opinions.

To read the full opinion, click here:
http://courts.ms.gov/images/Opinions/CO101803.pdf

Shawn Antonio Jackson v. State, No. 2012-CP-01485-COA (Miss.Ct.App. May 5, 2015)

CASE: PCR – Several Counts of Transfer of a Controlled Substance and Possession with intent to Distribute
SENTENCE: 20 years

COURT: Harrison County Circuit Court
TRIAL JUDGE: Hon. Lawrence Paul Bourgeois Jr.

APPELLANT ATTORNEY: Shawn Antonio Jackson (Pro Se)
APPELLEE ATTORNEY: Barbara Wakeland Byrd

DISPOSITION: Denial of PCR Reversed and Remanded. Barnes, J., for the Court. Lee, C.J., Griffis, P.J., Ishee, Roberts, Maxwell, Fair and James, JJ., Concur. Irving, P.J., and Carlton, J., Concur in Result Only.

ISSUE: Whether the trial court erred in finding Jackson did not have permission to amend his PCR and whether the claim is time barred.

FACTS: On March 30, 2001, Shawn Antonio Jackson pled guilty multiple counts of transferring a controlled substance and possession with intent. The plea was on the last day of the term, and Jackson was sentenced to 20 years. That same day, Jackson moved to reduce his sentence and to carry the motion from term to term. The circuit court granted the motion. On July 16, 2001, the circuit court reduced Jackson's sentence to 12 years to serve. The State moved to reconsider and convinced the circuit court that the it lacked jurisdiction to reduce Jackson's sentence, since the term of court had ended, and that Jackson's only recourse was to file a PCR. On July 27, 2001, the circuit court set aside the July 16 order and re-imposed Jackson's 20 year sentence. Jackson then promptly filed a PCR on August 2, 2001. No action was taken on Jackson's motion for over eleven years. On September 10, 2012, Jackson amended and/or supplemented his PCR and argued, for the first time, that the circuit court did have jurisdiction to reduce his sentence. The circuit court declined to address the merits of Jackson's claim and adopted the State's argument that Jackson had failed to obtain permission to amend his post-conviction motion, and that it was time-barred as it was not filed within three years of Jackson's resentencing. Jackson appealed.

HELD: In *Presley v. State*, 792 So. 2d 950 (Miss. 2001), the SCT held that a circuit court retains jurisdiction, after a term of court has ended, to rule on motions filed during that term of court. The State conceded on appeal that the circuit court did have jurisdiction to reduce Jackson's sentence, but argued that the Court should ignore the merits of Jackson's claim and adopt the circuit court's rationale that the motion is procedurally barred.

The trial court abused its discretion in dismissing the pleading based upon the pro se prisoner's failure to include a separate motion for leave to amend. Rather, the trial court should have analyzed the pleading to determine whether leave to amend should have been granted. Jackson's original PCR was filed after the *Presley* opinion had been rendered but before the decision became final. The COA found no injustice in refusing to allow Jackson to amend and/or supplement his PCR to challenge the reinstated sentence under *Presley*. The State did not alleged any prejudice.

If Jackson's pleading is allowed to be amended, the amended pleading relates back to the original PCR and is timely under §99-39-5(2). If Jackson's pleading is considered supplemental, the claim falls within an exception to the three-year-limitation period of §99-39-5(2). Either way, the claim is not time-barred. *Presley* was an intervening decision under §99-39-5(2)(a)(i).

Since the court's reason for re-imposing the twenty-year sentence was legally incorrect, the case was remanded for the circuit court to consider the merits of Jackson's claim that his 12 year sentence should be reinstated.

To read the full opinion, click here:
http://courts.ms.gov/images/Opinions/CO102472.pdf

May 12, 2015

Mark Dwayne Sumrell v. State, No. 2014-CP-00303-COA (Miss.Ct.App. May 12, 2015)

CASE: PCR – Felony Shoplifting
SENTENCE: Life w/o Parole as an habitual offender

COURT: Washington County Circuit Court
TRIAL JUDGE: Hon. W. Ashley Hines

APPELLANT ATTORNEY: Mark Dwayne Sumrell (Pro Se)
APPELLEE ATTORNEY: LaDonna C. Holland

DISPOSITION: Denial of PCR Affirmed. Carlton, J., for the Court. Lee, C.J., Irving and Griffis, P.JJ., Barnes, Ishee, Roberts, Maxwell and Fair, JJ., Concur. James, J., Concurs in Part Without Separate Written Opinion.

ISSUES: (1) Whether the circuit court erred by finding that petitioner served more than a year in prison on his prior robbery conviction; and (2) whether Sumrell's sentencing as a habitual offender is illegal and constitutes cruel and unusual punishment.

FACTS: Mark Dwayne Sumrell was convicted of felony shoplifting and sentenced to life imprisonment as a habitual offender. On October 13, 2003, Sumrell entered a Kroger in Greenville. A security guard observed Sumrell go immediately to a rack of leather jackets. Sumrell took one of the jackets and headed further into the store. The guard saw Sumrell put the jacket on. The tags had been removed. Sumrell then made his way toward the exit without paying for the jacket. The guard intercepted Sumrell and requested that he remove the jacket and come to the office. Sumrell asked if he could just remove the jacket and leave the store, but the guard had him go to the office and called police. This was Sumrell's third shoplifting offense, so he was charged with a felony. The case was affirmed by the COA. Although the SCT found Sumrell was properly sentenced as an habitual offender on direct appeal (*Sumrell v. State*, 972 So.2d 572 (¶16) (Miss. January 10, 2008)), the Court later granted him leave to file a PCR on the matter since the record was ambiguous. The circuit court held an evidentiary hearing and determined Sumrell did serve at least one year on a prior robbery conviction. Relief was denied and Sumrell appealed.

HELD: (1) The trial judge did not err in denying relief. The evidence presented at the evidentiary hearing showed that Sumrell was confined in the county jail from February 11, 1993, until his revocation on February 22, 1993. Following the revocation of his probation, Sumrell was confined until March 29, 1994, when he was released from MDOC's custody after serving one year and forty-six days of his sentence for robbery.

(2) The State used Sumrell's separate prior felony convictions for robbery, a crime of violence, and for cocaine possession to support his sentencing for felony shoplifting as a habitual offender. Sumrell's

two prior felony convictions meet the statutory requirements for sentencing as a habitual offender under §99-19-83. His sentence was not illegal or cruel and unusual.

To read the full opinion, click here:
http://courts.ms.gov/Images/Opinions/CO103331.pdf

Monroe Randle v. State, No. 2014-CP-00153-COA (Miss.Ct.App. May 12, 2015)

CASE: PCR – Murder
SENTENCE: Life

COURT: Clay County Circuit Court
TRIAL JUDGE: Hon. James T. Kitchens Jr.

APPELLANT ATTORNEY: Monroe Randle (Pro Se)
APPELLEE ATTORNEY: Barbara Byrd

DISPOSITION: Dismissal of PCR Reversed and Remanded. Ishee, J., for the Court. Lee, C.J., Irving and Griffis, P.JJ., Barnes, Roberts, Carlton, Maxwell, Fair and James, JJ., Concur.

ISSUE: Whether the trial judge erred in summarily dismissing Randle's PCR.

FACTS: Monroe Randle was convicted of murder in 1980. He was ordered to serve a life sentence. On February 24, 2010, Randle was granted parole. However, his parole was revoked in July 2012 after he was arrested for simple assault by threat and possession of a firearm. Randle filed a PCR in the circuit court contesting the revocation of his parole. The circuit court summarily dismissed the PCR motion on the ground that Parole Board is the sole authority on granting or revoking parole. Randle appealed, arguing that his parole was unlawfully revoked because he was never convicted of the crimes upon which the revocation of his parole was based.

HELD: "In this case, the circuit court judge summarily dismissed Randle's PCR motion without an evidentiary hearing, and there is no record before this Court providing the information the judge relied upon in revoking Randle's parole. Therefore, we reverse and remand this case for an evidentiary hearing."

To read the full opinion, click here:
http://courts.ms.gov/Images/Opinions/CO102169.pdf

Alison Nicole Williams a/k/a Alison Raziano a/k/a Raz a/k/a Alison Williams a/k/a Alison Nicole Williams Raziano Walton v. State, No. 2014-CA-00129-COA (Miss.Ct.App. May 12, 2015)

CASE: PCR – Armed Robbery
SENTENCE: 10 years to serve 10 years of PRS, with 5 years reporting and 5 years nonreporting

COURT: DeSoto County Circuit Court
TRIAL JUDGE: Hon. Gerald W. Chatham, Sr.

APPELLANT ATTORNEY: Wanda Turner-Lee Abioto
APPELLEE ATTORNEY: Barbara Wakeland Byrd

DISPOSITION: Denial of PCR Affirmed. Lee, C.J., for the Court. Irving and Griffis, P.JJ., Barnes, Ishee, Roberts, Carlton, Maxwell and Fair, JJ., Concur. James, J., Concurs in Part Without Separate Written Opinion.

ISSUES: (1) Whether her plea was involuntary, (2) whether there was no factual basis to support her plea, and (3) whether her counsel was ineffective.

FACTS: On June 29, 2012, Alison Nicole Williams pled guilty to armed robbery. On November 22, 2013, Williams filed a motion for post-conviction relief (PCR). Williams argued that there was no factual basis to support her plea and that her trial counsel's assistance was ineffective. The trial court denied Williams's motion. Williams appealed.

HELD: (1) Williams argues that her plea was involuntary because she was under the influence of prescription drugs and suffering from a mental illness. However, she raided this issue for the first time on appeal. The claim is barred and the record does not support plain error.

(2) Williams argues that there was no factual basis to support her plea because she did not exhibit a deadly weapon. The State alleged Williams gave an employee of DeSoto Discount Drug Store, a note demanding prescription drugs. The note said she had a gun and would shoot if the alarm was triggered. The pharmacist was able to restrain her and a gun was found in her waistband. The note was sufficient to threaten the use of a deadly weapon.

(3) Williams claimed her trial counsel failed to tell the court that she was suffering from a mental illness and was under the influence of prescription drugs. She alleged counsel also failed to advise her of the elements of armed robbery and failed to object to the factual basis presented by the State. "Having found that the issues regarding Williams's mental state and the factual basis for her plea are without merit, we cannot find that Williams's trial counsel was deficient."

To read the full opinion, click here:
http://courts.ms.gov/Images/Opinions/CO103121.pdf

Donnie McDonald v. State, No. 2014-CP-00833-COA (Miss.Ct.App. May 12, 2015)

CASE: PCR – Sale of a controlled substance and Possession of Precursors with intent to Manufacture.
SENTENCE: 20 years suspended on each count, concurrently, and 5 years supervised probation

COURT: Chickasaw County Circuit Court
TRIAL JUDGE: Hon. Andrew K. Howorth

APPELLANT ATTORNEY: Donnie Mcdonald (Pro se)
APPELLEE ATTORNEY: Melanie Dotson Thomas

DISPOSITION: Denial of PCR Affirmed. Lee, C.J., for the Court. Griffis, P.J., Barnes, Ishee,

Roberts, Carlton, Maxwell, Fair and James, JJ., Concur. Irving, P.J., Concurs in Part and in the Result Without Separate Written Opinion.

ISSUES: (1) Whether the trial court lacked jurisdiction to suspend his sentence or place him on probation, and (2) whether he was denied due process during his probation revocation.

FACTS: In 2010, Donnie McDonald pled guilty to one count of sale of a controlled substance and one count of possession of precursors with intent to manufacture. In December 2012, McDonald was arrested and charged with possession of methamphetamine with intent to distribute and possession of marijuana with intent to distribute. The State then filed a petition to revoke McDonald's probation. After a probation-revocation hearing, issued an order revoking McDonald's probation. McDonald appealed.

HELD: (1) McDonald contends he had seven prior convictions; thus, the trial court was not allowed to suspend his sentence or place him on probation. McDonald was correct that at the time of his sentencing, §47-7-33 did not allow a previously convicted felon to receive a suspended sentence and probation. However, the SCT has determined such sentences are not illegal. See *Johnson v. State*, 925 So. 2d 86, 103 (¶32) (Miss. 2006).

(2) McDonald also contends he was denied due process during his probation revocation. During the revocation hearing, a probation officer testified that McDonald had: failed three drug tests; admittedly smoked marijuana; twice failed to complete a drug-treatment program; and failed to report to her on four separate occasions. McDonald had been arrested with felony amounts of drugs in his possession. McDonald further admitted to the trial court that he was using marijuana. It appears the trial court had sufficient information to revoke McDonald's probation.

McDonald also claims he was not given adequate time to prepare for his revocation hearing. However, McDonald executed a waiver of his right to a preliminary probation-revocation hearing and requested a formal revocation hearing. He also executed a waiver regarding notice. This claim is without merit.

To read the full opinion, click here:
http://courts.ms.gov/Images/Opinions/CO103120.pdf

May 19, 2015

Billy Dale Hill v. State, No. 2014-CP-00867-COA (Miss.Ct.App. May 19, 2015)

CASE: PCR – Murder and Rape
SENTENCE: Consecutive Life Sentences

COURT: Sunflower County Circuit Court
TRIAL JUDGE: Hon. Margaret Carey-McCray

APPELLANT ATTORNEY: Billy Dale Hill (Pro Se)
APPELLEE ATTORNEY: Anthony Louis Schmidt, Jr.

DISPOSITION: Appeal Dismissed. Carlton, J., for the Court. Lee, C.J., Irving and Griffis, P.JJ., Barnes, Ishee, Roberts, Maxwell, Fair and James, JJ., Concur.

ISSUE: Whether the circuit court erred in upholding MDOC's decision to deny earned-time credit on a rape conviction sentence which was consecutive to a life sentence to murder.

FACTS: On October 24, 1977, Billy Dale Hill pled guilty to murder and rape. The circuit court judge, sitting without a jury, sentenced Hill to two consecutive life sentences for each crime. On September 22, 2011, the Mississippi Supreme Court entered an order holding that Hill's life sentence for rape was illegal. On remand, the circuit court resentenced Hill to 45 years for his rape conviction, consecutive to the life sentence for murder. MDOC later held that Hill was ineligible to receive earned-time credit on his rape conviction for the time he served before the circuit court's resentencing order, since he was then serving his life sentence for murder. Hill challenged MDOC's decision through the Administrative Remedy Program (ARP), but a final decision on August 10, 2012, denied relief. Two months later, Hill sought judicial review of the decision. The circuit court found that Hill was still serving the life sentence imposed for his murder conviction and would not begin serving the separate 45-year sentence for his rape conviction until he completed his sentence for murder. Therefore, Hill was ineligible to receive earned-time credit for the rape sentence. Hill appealed.

HELD: Hill waited two months to file his appeal of the MDOC decision. An appeal of the ARP decision must be filed within 30 days under §47-5-807. Hill's failure to timely seek judicial review of MDOC's decision bars his appeal.

To read the full opinion, click here:
http://courts.ms.gov/Images/Opinions/CO103193.pdf

Kenny Walton a/k/a "K Dog" v. State, No. 2013-CA-01708-COA (Miss.Ct.App. May 19, 2015)

CASE: PCR – Armed Robbery, Kidnapping, Aggravated Assault, Arson, and Conspiracy
SENTENCE: 51 years

COURT: Bolivar County Circuit Court
TRIAL JUDGE: Hon. Albert B. Smith, III

APPELLANT ATTORNEY: Tim C. Holleman
APPELLEE ATTORNEY: Melanie Dotson Thomas

DISPOSITION: Dismissal of PCR Reversed and Remanded. Barnes, J., for the Court. Lee, C.J., Griffis, P.J., Ishee, Roberts, Carlton, Maxwell, Fair and James, JJ., Concur. Irving, P.J., Concurs in Part and Dissents in Part Without Separate Written Opinion.

ISSUES: (1) Whether the trial court erred in dismissing the PCR motion on the ground that it was a successive motion; (2) whether the State violated *Brady v. Maryland*, by failing to disclose to Walton the fact that Matthews and McKnight had given statements exculpating Walton before Walton's guilty plea; (3) alternatively, if the State properly disclosed the exculpatory information, whether Walton's attorney was ineffective in not disclosing this information to Walton prior to his guilty plea; and (4)

whether the guilty plea was defective because it lacked an adequate factual basis or explanation of the elements of the offense.

FACTS: Kenny Walton pled guilty to several crimes in connection to the October 31, 2007, robbery and beating of a pizza deliveryman in Cleveland, MS. While investigating the crime, police found Walton using the stolen cell phone belonging to the victim. Walton first claimed he was not involved but heard that his brother, along with two others, had robbed the pizza employee. He claimed he got the phone from that Corderal McKnight, and said McKnight must have been involved along with Jasmond Matthews. He later gave a statement claiming that he overheard Matthews, McKnight, and Michael McGee talking about the robbery. Then he claimed he was present when the victim was beaten and robbed, but only watched. All four were later indicted. In October 2008, Matthews and McKnight entered guilty pleas to charges relating to the incident, agreeing to testify against McGee and Walton. On October 21, 2008, Walton signed a petition to enter a guilty plea to all of the charges.

On November 14, 2008, the State filed a one-page document in Walton's and McGee's cases disclosing that Matthews and McKnight had been interviewed, and that neither Matthews or McKnight inculpated McGee or Walton, but instead named other accomplices. The supplemental discovery was mailed and faxed to counsel for McGee and Walton. Nevertheless, on November 21, 2008, Walton entered a guilty plea to all five counts. The State recommended 15 years as he agreed to testify against McGee. On May 22, 2009, Walton's attorney, filed a motion to withdraw Walton's guilty plea, claiming counsel never received notice of the new information regarding Matthews and McKnight. The motion was denied. McGee was tried and Walton testified he and McGee were not involved. Matthews and McKnight also testified that they committed the crimes with two other individuals, and that McGee and Walton had nothing to do with the crimes. McGee was acquitted.

On May 27, 2009, the State moved to revoke Walton's bond based upon his failure to testify as expected against McGee. On July 8, 2009, Walton's counsel filed a Renewed Motion to Withdraw Guilty Plea. The motion was denied and Walton was sentenced to 51 years. At a motion to reconsider sentence, the circuit court held he was without authority to alter the sentence as the term of court had ended and denied relief. The court noted Walton could challenge the sentence in a PCR. Walton appealed, but the case was dismissed for lack of jurisdiction because it appeared to be an attempt to appeal a guilty plea and sentence. The order noted Walton could file a PCR. Walton later did so, but the circuit court dismissed the PCR as a successive writ, as the court had ruled on the issue during his Walton's motion to reconsider his sentence. Walton appealed.

HELD: (1) Walton's 2009 motion to reconsider his sentence was not filed as a PCR under §99-39-5. It was treated that way only because of the trial court's mistaken belief that it had no jurisdiction to consider the motion otherwise. The Court reaffirmed its prior dismissal order finding Walton's appeal was not a PCR. The trial court erred in dismissing the 2012 PCR as a successive writ. This was not harmless error, as the issues were not adequately discussed to rule in the alternative.

(2) Based on Walton's guilty plea, he is precluded from asserting a *Brady* claim.

(3) The circuit court must make a finding of fact on whether or not Walton's counsel received notice of the supplemental discovery. McGee's counsel testified he did receive notice and discussed this with Walton's counsel. The trial court made no finding as to whether counsel received the disclosure prior

to the acceptance of Walton's plea. The existing record seems to support Walton's claim that the exculpatory statements of McKnight and Matthews were not disclosed to him prior to his guilty plea.

> We reverse and remand to the trial court to make findings of fact on whether [counsel] learned of Matthews's and McKnight's October 2008 statements, whether he reviewed these with Walton prior to entering his guilty plea, and the effect any non-disclosure had on Walton's plea.

(4) The factual basis for the guilty plea was sufficient. Walton's admission to being present, along with the victim's testimony that all four individuals actively assisted in committing the crimes, is sufficient to support Walton's convictions.

To read the full opinion, click here:
http://courts.ms.gov/Images/Opinions/CO101996.pdf

Tommy Hamberlin v. State, No. 2013-CP-01831-COA (Miss.Ct.App. May 19, 2015)

CASE: PCR – Possession of a Controlled Substance
SENTENCE: 7 years for one count of possession of controlled substance, 8 years for one count of possession of a controlled substance as a habitual offender (plus 5 years and 180 days for the revocation of a prior suspended sentence), all to run consecutively.

COURT: Warren County Circuit Court
TRIAL JUDGE: Hon. M. James Chaney, Jr.

APPELLANT ATTORNEY: Tommy Hamberlin (Pro Se)
APPELLEE ATTORNEY: Melanie Dotson Thomas

DISPOSITION: Dismissal of PCR Affirmed. Griffis, P.J., for the Court. Lee, C.J., Irving, P.J., Barnes, Ishee, Carlton, Maxwell and Fair, JJ., Concur. Roberts, J., Concurs in Result Only. James, J., Not Participating.

ISSUES: (1) Whether the circuit court erred in dismissing the motion as time-barred; (2) whether Hamberlin received ineffective assistance of counsel; (3) the 2001 indictment was insufficient; (4) cumulative error necessitates a reversal; and (5) the errors violated his fundamental constitutional right of due process.

FACTS: While on post-release-supervision for a 2001 conviction for possession of a controlled substance, Tommy Hamberlin arrested and indicted for the sale and delivery of a controlled substance on July 24, 2006. Based on a 1995 conviction and his 2001 conviction, Hamberlin was indicted as an habitual offender. On February 7, 2007, Hamberlin pled guilty to the reduced charges of two counts of possession of a controlled substance. On May 29, 2013, Hamberlin filed a motion to vacate the judgment of conviction and sentence, which the circuit court treated as a PCR and dismissed as time-barred. Hamberlin appealed.

HELD: (1) Hamberlin filed 6 years after his guilty plea. The motion was time-barred. Hamberlin failed to argue that either an intervening decision or the discovery of new evidence supported his motion.

(2) Hamberlin argued his counsel performed in a deficient manner by lying and failing to fully inform him regarding the length of his potential sentence if he pled guilty, by failing to object to the circuit court's revocation of his allegedly illegal sentence from 2001, by preventing him from pleading not guilty, and by failing to appeal his sentence in 2007. However, Hamberlin failed to submit any supporting affidavits. Hamberlin failed to meet his burden in proving ineffective assistance, and failed to overcome the time-bar.

(3) Hamberlin also contests his 2000 indictment and sentence by arguing the circuit court could not revoke his suspended sentence because the sentence was illegal. Hamberlin claimed, as a habitual offender, he could not be given a suspended sentence. However, the circuit court did not sentence him as a habitual offender in 2001. His claim was without merit.

To read the full opinion, click here:
http://courts.ms.gov/Images/Opinions/CO103189.pdf

June 2, 2015

William Dwayne Salter v. State, No. 2014-CP-00523-COA (Miss.Ct.App. June 2, 2015)

CASE: PCR – Burglary, Armed Robbery x2, and Kidnapping x4
SENTENCE: Six 30-year concurrent sentences on four counts of kidnapping, and two counts of armed robbery, and a seven-year consecutive sentence for burglary,

COURT: George County Circuit Court
TRIAL JUDGE: Hon. Dale Harkey

APPELLANT ATTORNEY: William Dwayne Salter (Pro Se)
APPELLEE ATTORNEY: Laura Hogan Tedder

DISPOSITION: Dismissal of PCR Affirmed. James, J., for the Court. Lee, C.J., Irving and Griffis, P.JJ., Ishee, Roberts, Carlton, Maxwell and Fair, JJ., Concur. Barnes, J., Concurs in Part and in the Result Without Separate Written Opinion.

ISSUE: Whether the trial judge erred in finding the PCR procedurally barred.

FACTS: On April 16, 2001, William Dwayne Salter pled guilty to burglary, armed robbery, and kidnapping. On December 10, 2012, Salter filed his third PCR. Salter contended that his trial counsel and PCR attorney were ineffective. Salter argued that the intervening decision of *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), served as an exception to the procedural bars. The trial court concluded that *Martinez* would not adversely affect either Salter's conviction or sentence. The trial court denied the petition and found that it was barred as a successive writ under §99-39-23(6) and barred by res judicata. He appealed.

HELD: Salter's petition is time-barred and successive-writ barred, and no exception is applicable to overcome the procedural bars. The petition is also barred by res judicata. *Martinez* is limited to federal habeas corpus review and is not applicable to state post-conviction relief actions. Merely raising a claim of ineffective assistance of counsel is not enough by itself to affect fundamental constitutional rights to overcome the procedural bar.

Salter also argued that his PCR counsel was deficient for failing to raise a theory of ineffective assistance regarding his trial counsel allegedly misinforming him about his eligibility for parole in his first PCR petition. However, there is no general right to counsel in post-conviction. Regardless, Salter failed to produce his own affidavit, or any affidavit for that matter, in support of his ineffective-assistance claim regarding his PCR counsel. Salter's third petition is also barred by res judicata because the issues he raises in this appeal could have and should have been raised in his first PCR.

To read the full opinion, click here:
http://courts.ms.gov/Images/Opinions/CO103018.pdf

Quartaveous Strickland v. State, No. 2014-CP-00190-COA (Miss.Ct.App. June 2, 2015)

CASE: PCR – Armed Robbery x3, and one count of conspiracy
SENTENCE: 20 years, with 15 to serve and 5 years PRS for each count of armed robbery, and 5 years for conspiracy, with all sentences running concurrently.

COURT: Washington County Circuit Court
TRIAL JUDGE: Hon. Richard A. Smith

APPELLANT ATTORNEY: Quartaveous Strickland (Pro Se)
APPELLEE ATTORNEY: Melanie Dotson Thomas, John R. Henry, Jr.

DISPOSITION: Denial of PCR Affirmed. Ishee, J., for the Court. Lee, C.J., Carlton and James, JJ., Concur. Irving and Griffis, P.JJ., Barnes, Maxwell and Fair, JJ., Concur in Part and in the Result Without Separate Written Opinion. Roberts, J., Concurs in Result Only Without Separate Written Opinion.

ISSUES: Whether the trial court erred in finding no double jeopardy violation in Strickland's multi-count indictment.

FACTS: On January 20, 2011, Quartaveous Strickland and two other individuals entered the Rack & Cue pool hall in Greenville with a shotgun and a handgun. Strickland forced a store employee, Webber Doris, at gunpoint to give him the money from the cash register and the store's money bag that was hidden in the microwave. In addition to taking money from Rack & Cue, Strickland and his co-defendants robbed Doris and William Fulton. On December 10, 2012, Strickland pled guilty to three counts of armed robbery and one count of conspiracy. On July 30, 2013, Strickland filed a PCR claiming his multi-count armed robbery indictment was multiplicitous and violated double jeopardy. The trial judge denied relief and Strickland appealed.

HELD: The COA found the issue procedurally barred for failing to raise the issue at trial. Regardless, Strickland and his co-defendants robbed the Rack & Cue as well as two individuals, placing each of them in immediate fear of injury with a deadly weapon and taking their personal property. Therefore, Strickland was properly charged with three counts of armed robbery.

To read the full opinion, click here:
http://courts.ms.gov/Images/Opinions/CO102171.pdf

June 9, 2015

Eric Daniel Lackaye v. State, No. 2014-CP-00375-COA (Miss.Ct.App. June 9, 2015)

CASE: PCR – Sale of Marijuana x2, and one count of Possession of Marijuana with intent
SENTENCE: 6 years on each count of sale of marijuana, and 40 years for possession with intent, all concurrent, with Lackaye to be released after serving 17 years.

COURT: Madison County Circuit Court
TRIAL JUDGE: Hon. John Huey Emfinger

APPELLANT ATTORNEY: Eric Daniel Lackaye (Pro Se)
APPELLEE ATTORNEY: Lisa L. Blount

DISPOSITION: Dismissal of PCR Reversed and Remanded. Carlton, J., for the Court. Lee, C.J., Irving and Griffis, P.JJ., Barnes, Ishee, Roberts, Maxwell, Fair and James, JJ., Concur.

ISSUES: (1) Whether Lackeye received ineffective assistance of counsel; (2) whether his guilty pleas were not knowingly, intelligently, and voluntarily entered; and (3) whether the trial court erred in summarily dismissing the PCR motion.

FACTS: On November 28, 2011, Eric Daniel Lackaye pled guilty to two charges of sale of marijuana as a subsequent drug offender, and one count of possession of marijuana with intent to distribute as a subsequent drug offender, pursuant to §41-29-147. An additional count for possession of Meth with intent to distribute was nol pros'd. On February 13, 2014, Lackaye filed a PCR, seeking to have his guilty pleas set aside because he received ineffective assistance of counsel and his pleas were not knowingly, voluntarily, and intelligently made. Lackaye specifically claimed that his defense counsel incorrectly advised him that if he pled guilty and acted as a model prisoner, he would be eligible for parole after serving four to five years, or 25% of his sentence.

HELD: Miss. Code Ann. §47-7-3(1)(f), prohibits prisoners convicted of a felony with enhanced penalties from receiving parole. Lackaye pled guilty as a subsequent drug offender under §41-29-147, and received enhanced sentences of twice the term, and therefore lacked eligibility for parole. Lackaye claims that his counsel advised him that because his crime was "nonviolent," he would be eligible for parole. Lackaye claims that had he been given correct information and advice as to his parole eligibility, then he would have gone to trial and not pled guilty.

A defendant is entitled to an evidentiary hearing if he alleges that his plea is involuntary because he relied on his attorney's erroneous advice regarding the possibility of parole, and his allegations are uncontradicted by the record. Lackaye provided his own affidavit in support of his PCR motion, affidavits from his father and another inmate, and also a letter allegedly from defense counsel, all of which bolster Lackaye's claim. The record reflects that the trial court provided no advice to Lackaye regarding parole eligibility during the plea hearing. Lackaye provided sufficient evidence in support of his PCR to entitle him to an evidentiary hearing to determine if his plea was voluntary. The hearing should also consider his ineffective assistance of counsel claim

To read the full opinion, click here:
http://courts.ms.gov/Images/Opinions/CO103385.pdf

William Antonio Avery v. State, No. 2014-CP-00767-COA (Miss.Ct.App. June 9, 2015)

CASE: PCR – Sale of a controlled substance w/in 1500 feet of a church
SENTENCE: 30 years with all be 6 days suspended and 5 years PRS

COURT: Lauderdale County Circuit Court
TRIAL JUDGE: Hon. Lester F. Williamson, Jr.

APPELLANT ATTORNEY: William Antonio Avery (Pro Se)
APPELLEE ATTORNEY: Scott Stuart

DISPOSITION: Dismissal of PCR Affirmed. Roberts, J., for the Court. Lee, C.J., Irving and Griffis, P.JJ., Ishee, Carlton, Maxwell, Fair and James, JJ., Concur. Barnes, J., Concurs in Part and in the Result Without Separate Written Opinion.

ISSUE: Whether the trial court erred in summarily dismissing Avery's second PCR.

FACTS: On June 8, 2009, after losing several pre-trial motions, William Antonio Avery entered a "best interests" guilty plea to the charge of sale of a controlled substance within 1,500 feet of a church. He was sentenced to 30 years with all but six days suspended and placed on PRS. On October 13, 2010, as a result of new felony convictions against Avery while he was on PRS, the trial judge entered an order revoking his PRS, and sentenced Avery to serve the remainder of his 30 year sentence. On March 31, 2011, Avery filed a PCR, attacking his guilty plea. The trial judge summarily dismissed the petition, which was affirmed on appeal. ***Avery v. State***, 95 So. 3d 765 (Miss. Ct. App. 2012). On February 7, 2014, Avery filed a second PCR, again attacking this same conviction, claiming he received ineffective assistance of counsel due to his attorney's advising him to plead guilty to charges resulting from an illegal arrest. He appealed the trial court's dismissal.

HELD: Although the PCR appears to be successive writ barred, the supreme court has not explicitly found that there is a fundamental constitutional right to effective assistance of counsel for noncapital cases sufficient to defeat procedural bars. Regardless, although these claims by Avery may satisfy part of the ineffective-assistance analysis—he would have insisted on trial—there is no evidence that Avery's counsel made any error in advising him to accept the State's plea offer. Avery presents absolutely no evidence supporting or even suggesting that the outcome of his case would have been

different had he proceeded to trial. Avery's motion is both time-barred and subsequent-writ barred, and is without merit.

To read the full opinion, click here:
http://courts.ms.gov/Images/Opinions/CO104301.pdf

James Ray Sanders v. State, No. 2014-CP-00411-COA (Miss.Ct.App. June 9, 2015)

CASE: PCR – Murder
SENTENCE: Life

COURT: Lafayette County Circuit Court
TRIAL JUDGE: Hon. John Andrew Gregory

APPELLANT ATTORNEY: James Ray Sanders (Pro Se)
APPELLEE ATTORNEY: LaDonna C. Holland

DISPOSITION: Denial of PCR Affirmed. Barnes, J., for the Court. Lee, C.J., Irving and Griffis, P.JJ., Ishee, Roberts, Carlton, Maxwell, Fair and James, JJ., Concur.

ISSUE: Whether the trial court erred in finding Sanders's second PCR procedurally barred.

FACTS: After initially being indicted in 1999 for capital murder, James Sanders later pled guilty to the murder of Charles Kenneth Maness. In October 2001, Sanders filed his first pro se PCR, which the trial court dismissed in May 2002. Sanders appealed arguing his guilty plea was involuntary, as the trial court failed to inform him of the mandatory minimum sentence he would receive for simple murder. He also raised ineffective assistance of counsel, and that he was improperly denied a preliminary hearing. This Court found Sanders's arguments without merit and affirmed the dismissal. ***Sanders v. State***, 847 So. 2d 903 (Miss. Ct. App. 2003). In February 2014, Sanders filed another PCR, alleging his counsel was ineffective for various reasons, and such ineffectiveness rose to the level of violating his constitutional rights, thereby excepting his motion from any procedural bars. The trial court denied Sanders's motion, finding it a successive writ and time-barred. The trial court also found Sanders was not entitled to any relief on the merits. Sanders appealed.

HELD: The supreme court has yet to rule that ineffective-assistance-of-counsel claims in noncapital cases invoke a fundamental right that eludes the procedural bars in post-conviction. Sanders made essentially the same arguments as he did in his first PCR.

> We see no reason to come to a different result here where Sanders has merely reworked his argument as an ineffective-assistance-of-counsel claim in order to attempt to overcome the procedural bar. Neither the law nor the facts have changed. Sanders has failed to present a case sufficient to overcome the procedural bars.

To read the full opinion, click here:
http://courts.ms.gov/Images/Opinions/CO104814.pdf

Christopher B. Sellers v. State, No. 2014-CP-00346-COA (Miss.Ct.App. June 9, 2015)

CASE: PCR – Malicious Mischief
SENTENCE: 5 years as an habitual offender

COURT: Oktibbeha County Circuit Court
TRIAL JUDGE: Hon. Lee J. Howard

APPELLANT ATTORNEY: Christopher B. Sellers (Pro se)
APPELLEE ATTORNEY: Laura Hogan Tedder

DISPOSITION: Denial of PCR Affirmed. Irving, P.J., for the Court. Lee, C.J., Griffis, P.J., Barnes, Ishee, Roberts, Carlton, Maxwell and Fair, JJ., Concur. James, J., Concurs in Part Without Separate Written Opinion.

ISSUES: (1) Whether he received an illegal sentence, and (2) whether he received effective assistance of counsel.

FACTS: On October 16, 2012, Christopher Sellers entered a plea of guilty to a charge of malicious mischief. On the day of his plea, the State filed a motion to amend his indictment to allege habitual offender status. Also, during the plea, Sellers's attorney sent another attorney to stand in for him because of a dentist appointment. On January 8, 2014, Sellers filed a PCR, claiming the court did not have authority to sentence him to 5 years without parole since he did not go to trial, and the State failed to prove he was an habitual offender. He also alleged ineffective assistance of counsel from his "stand-in" attorney. The trial judge denied relief and Sellers appealed.

HELD: (1) Sellers's sentence was not illegal. As an habitual offender, the judge had no choice but to sentence him to the maximum time for malicious mischief. In the plea petition, Sellers admitted to his two prior convictions, and confirmed his attorney advised him of the ramifications of pleading guilty. Contrary to Sellers's assertion, the court did enter an order on the date of the plea amending the indictment. The State produced sentencing orders which established that Sellers had been convicted of two separate felonies, felony DUI in Oktibbhea County, and aggravated battery on a pregnant woman in Florida. The issue is without merit.

(2) The record belies Sellers's claim that he was not informed his sentence would be mandatory. The trial judge made sure Sellers was satisfied with his stand-in counsel and understood that the court had no discretion in sentencing. Sellers has not explained how his stand-in attorney's failure to object to the amendment of the indictment prejudiced his case. This was part of the plea deal.

To read the full opinion, click here:
http://courts.ms.gov/Images/Opinions/CO104516.pdf

Henry J. Laneri, III v. State, No. 2014-CP-00402-COA (Miss.Ct.App. June 9, 2015)

CASE: PCR – Possession of Contraband Inside a Correctional Facility
SENTENCE: 8 years, with 2 years to serve and 6 on PRS, with 5 years supervised.

COURT: Pearl River County Circuit Court
TRIAL JUDGE: Hon. Anthony Alan Mozingo

APPELLANT ATTORNEY: Henry J. Laneri III (Pro Se)
APPELLEE ATTORNEY: Stephanie Breland Wood

DISPOSITION: Denial of PCR Affirmed. Lee, C.J., for the Court. Irving and Griffis, P.JJ., Ishee, Roberts, Carlton, Maxwell and Fair, JJ., Concur. Barnes, J., Concurs in Part and in the Result. James, J., Concurs in Part.

ISSUE: Whether the trial court erred in treating and dismissing his petition to clarify his sentence as a PCR.

FACTS: On January 13, 2012, Henry J. Laneri, III, pled guilty to possession of contraband inside a correctional facility. On September 11, 2013, Laneri filed a petition to clarify his sentence. Treating the petition as a PCR, the trial court denied Laneri's motion, finding that its written order of conviction, which included post-release supervision, prevailed over its oral pronouncement that did not. Laneri appealed, arguing that the sentence contained in the sentencing order was erroneous because it did not accurately reflect the sentence orally pronounced by the trial court, was not a part of the State's sentencing recommendation, and was not included in his petition to enter a guilty plea.

HELD: The trial court orally sentenced Laneri to eight years, with two years to serve and six years suspended, to run concurrently with the sentence he was already serving. The trial court's written order sentenced Laneri to eight years, with two years to serve and six years of post-release supervision, five years supervised, to run concurrently with the sentence he was already serving. The written sentencing order controls. Laneri stated during the plea he understood the judge did not have to follow the State's recommendations.

Laneri did not seek to clarify his written sentence claiming that he was uncertain about the operation of the sentence. Instead, he argued that the sentence contained in the sentencing order was erroneous. This was an attack on the legality of the sentence, and the trial judge properly treated it as a PCR.

To read the full opinion, click here:
http://courts.ms.gov/Images/Opinions/CO102064.pdf

June 16, 2015

Joseph Bolden v. State, No. 2014-CP-00061-COA (Miss.Ct.App. June 16, 2015)

CASE: PCR – Sexual Battery
SENTENCE: 25 years

COURT: Lowndes County Circuit Court
TRIAL JUDGE: Hon. Lee J. Howard

APPELLANT ATTORNEY: Joseph Bolden (Pro Se)

APPELLEE ATTORNEY: John R. Henry

DISPOSITION: Dismissal of PCR Affirmed. Roberts, J., for the Court. Lee, C.J., Irving and Griffis, P.JJ., Barnes, Ishee, Carlton, Maxwell, Fair and James, JJ., Concur.

ISSUE: Whether the trial judge erred in dismissing Bolden's PCR.

FACTS: On May 12, 1998, Joseph Bolden pled guilty to sexual battery and was sentenced to 25 years. Bolden admitted to committing cunnilingus on a 12 year old girl. On October 1, 2013, Bolden filed a PCR alleging several due process violations, that he was incompetent to plead guilty, and that he received ineffective assistance of counsel. The trial judge dismissed the petition as time barred and Bolden appealed.

HELD: Bolden's appeal raised several different claims, many of which were difficult to decipher. On its face, Bolden's motion is both time-barred and subsequent-writ barred. He previously filed a PCR, which was appealed and dismissed for failure to pay the costs of appeal in 2000. The majority of his claims were procedurally barred and were not discussed.

Although Bolden alleged he was incompetent, the record contains no reason the court should have ordered a competency hearing. Bolden's attorney never raised any issues of competency. Bolden also fails to present any evidence to support his assertion of incompetency—no affidavits from other persons, no facts to support his stance, no mental health records. This claim is without merit. Bolden also failed to show ineffective assistance. Bolden presents no affidavits or statements other than his own to support his claims of ineffective assistance. This claim is also without merit.

To read the full opinion, click here:
http://courts.ms.gov/Images/Opinions/CO104787.pdf

June 23, 2015

Stanley Montgomery v. State, No. 2014-CP-00498-COA (Miss.Ct.App. June 23, 2015)

CASE: PCR – Identity Theft
SENTENCE: 5 years on each count, concurrently with 2 weeks to serve and 4 years and 50 weeks on PRS

COURT: Winston County Circuit Court
TRIAL JUDGE: Hon. Joseph H. Loper, Jr.

APPELLANT ATTORNEY: Stanley Montgomery (Pro Se)
APPELLEE ATTORNEY: Scott Stuart

DISPOSITION: Denial of PCR Affirmed. Lee, C.J., for the Court. Irving and Griffis, P.JJ., Barnes, Ishee, Roberts, Carlton, Maxwell, Fair and James, JJ., Concur.

ISSUES: (1) Whether the trial court erred in denying his PCR; (2) whether his constitutional rights

were violated at the restitution center; (3) whether his PRS revocation was unlawful; (4) whether the trial court failed to acknowledge that he had pursued administrative remedies; (5) whether the trial court had jurisdiction; and (6) whether the trial court erred in excluding certain documents from the record.

FACTS: Stanley Montgomery pled guilty to five counts of identity theft. Subsequent to his release on PRS, the Winston County Circuit Court found Montgomery in arrears for failure to pay his fees. The trial court ordered Montgomery to a restitution center located in Leflore County until his fees were paid. One month later, the trial court determined Montgomery had failed to pay his fees and sent him to another restitution center located in Hinds County. In November 2013, Montgomery was expelled, upon his request, from this restitution center. Shortly thereafter, the trial court revoked Montgomery's PRS and ordered him to serve the remaining four years and fifty weeks of his five-year sentence. His request for post-conviction relief was denied. He appealed.

HELD: Several claims that Montgomery raised on appeal were not included in his PCR. Those claims were not addressed.

(1) thru (4) Montgomery contends the trial court erred by denying his PCR; his constitutional rights were violated while he was in the restitution center; and the trial court should not have revoked his PRS for the nonpayment of fees. Montgomery claims his poor treatment at the restitution center forced him to leave the job that had been assigned to him and seek expulsion from the center. There is nothing in the record to support Montgomery's claim that he sought administrative relief. The trial court determined, and Montgomery admitted, that he violated the terms of his PRS by failing to remain at a restitution center as ordered and by failing to pay restitution and other fees.

(5) Montgomery argued the trial court did not have jurisdiction over him while he was in the restitution program; therefore, the trial court did not have the authority to revoke his PRS. However, the trial court has the sole authority to revoke an offender's PRS for misconduct that occurs when an offender is on PRS.

(6) Montgomery attached documents in his appeal that he claims were excluded by the trial court. As these documents were not included in the record before the trial court, they can not be considered on appeal.

To read the full opinion, click here:
http://courts.ms.gov/Images/Opinions/CO104275.pdf

Christopher Benoman v. State, No. 2014-CP-01223-COA (Miss.Ct.App. June 23, 2015)

CASE: PCR – Lustful Touching of a Child x2
SENTENCE: Concurrent terms of 15 years on each count, suspended, with 5 years probation

COURT: Lauderdale County Circuit Court
TRIAL JUDGE: Hon. Lester F. Williamson, Jr.

APPELLANT ATTORNEY: Christopher Benoman (Pro Se)

APPELLEE ATTORNEY: Billy L. Gore

DISPOSITION: Denial of PCR Affirmed. Lee, C.J., for the Court. Irving and Griffis, P.JJ., Barnes, Ishee, Roberts, Carlton, Maxwell and Fair, JJ., Concur. James, J., Concurs in Part.

ISSUES: (1) Whether he was mentally incompetent at the time of his plea, and (2) whether errors in the factual basis of his plea warrant relief.

FACTS: On November 4, 2009, Christopher Benoman pled guilty two counts of lustful touching of a child. On February 20, 2013, the trial court revoked Benoman's probation for the commission of second-offense DUI, driving on a suspended license, reckless driving, and testing positive for marijuana. His probation was revoked and he was sentenced to 15 years on each count of lustful touching, with the sentences to run concurrently. On March 27, 2014, Benoman filed a PCR. The trial court denied Benoman's motion. He appealed.

HELD: Benoman's PCR is time-barred. Regardless, the COA addressed his claims and found them to be without merit.

(1) Benoman argued that he was incompetent to stand trial because he had previously been diagnosed with "bipolar disorder or manic depressi[on] and may have some issue of schizophrenia." He also argued that his trial counsel was ineffective because he failed to request a psychiatric evaluation. The trial judge addressed his mental issues during his plea. Further, because there was no reasonable ground to believe Benoman was incompetent to stand trial, his trial counsel was under no obligation to request a psychiatric evaluation or otherwise investigate Benoman's previous diagnoses and hospitalizations further.

(2) There were no errors in the factual basis of his plea to warrant reversal. The trial judge was going over preliminary matters when he stated police were notified on the dates when the incidents occurred. They were in fact notified later, which the State correctly stated during the plea. Further, the State did not misrepresent that one of the victims underwent a rape kit. By pleading guilty, Benoman waived his right to cross-examine any witnesses.

To read the full opinion, click here:
http://courts.ms.gov/Images/Opinions/CO104460.pdf

June 30, 2015

Alvin Thomas (Alvin) , III v. State, No. 2014-CP-00673-COA (Miss.Ct.App. June 30, 2015)

CASE: PCR – Armed Robbery
SENTENCE: 30 years with 25 to serve and 5 years PRS

COURT: Pearl River County Circuit Court
TRIAL JUDGE: Hon. Anthony Alan Mozingo

APPELLANT ATTORNEY: Alvin Thomas III (Pro Se)

APPELLEE ATTORNEY: Jeffrey A. Klingfuss

DISPOSITION: Dismissal of PCR Affirmed. Roberts, J., for the Court. Lee, C.J., Irving and Griffis, P.JJ., Barnes, Ishee, Carlton, Maxwell, Fair and James, JJ., Concur.

ISSUES: (1) Whether he was denied due process in his sentencing, (2) whether his guilty plea violated his constitutional rights.

FACTS: On July 8, 2013, Alvin Thomas, III entered an open plea to armed robbery stemming from an incident which occurred in November of 2011. Thomas subsequently filed a PCR on March 4, 2014, which the circuit court summarily denied. He appealed.

HELD: (1) Thomas's first issue was a very long compliant about his sentencing and parole eligibility. "Because Thomas has not provided this Court with a cohesive argument or explanation of this issue, including proper and relevant citations, we decline to address this issue on appeal."

(2) Thomas argued that his constitutional rights were violated in several ways. Thomas was informed, at his guilty-plea hearing and in his guilty-plea petition, that he would have the right to call witnesses at trial, and if he elected to go to trial, he would have the right to an attorney.

Thomas also argued that his attorney was ineffective because he failed to advise Thomas of his rights under the 5th Amendment. The record is clear that Thomas was informed of his constitutional rights by his guilty-plea petition and again by the trial court at his guilty-plea hearing. Thomas asserts that his attorney was ineffective because he waived Thomas's right to a competency hearing, and that there was an issue regarding his competency to plead guilty. However, there was nothing in the record to support this.

Finally, Thomas claimed his attorney was ineffective because he informed Thomas that he would only be sentenced to two or three years. Again, Thomas was informed of the statutory minimum and maximum sentences available, with the maximum being life imprisonment. Thomas entered an open plea, with no sentence recommendation from the State. His claims are without merit.

To read the full opinion, click here:
http://courts.ms.gov/Images/Opinions/CO104834.pdf

Kelly Mann v. State, No. 2013-CP-00982-COA (Miss.Ct.App. June 30, 2015)

CASE: PCR – Murder and Armed Robbery
SENTENCE: Life plus a consecutive 40 years

COURT: Leake County Circuit Court
TRIAL JUDGE: Hon. Marcus D. Gordon

APPELLANT ATTORNEY: Kelly Mann (Pro Se)
APPELLEE ATTORNEY: Billy L. Gore

DISPOSITION: Dismissal of PCR Affirmed. Barnes, J., for the Court. Lee, C.J., Irving and Griffis, P.JJ., Ishee, Roberts, Carlton, Maxwell and Fair, JJ., Concur. James, J., Concurs in Part Without Separate Written Opinion.

ISSUES: (1) Whether his indictment failed to charge the essential elements of armed robbery, and (2) whether his counsel's performance was ineffective.

FACTS: On August 9, 1993, Kelly Mann pled guilty to simple murder and armed robbery after being indicted for capital murder. Mann filed his first PCR in 1994. Throughout the years, he filed several PCRs which were denied. On On March 28, 2013, Mann filed his fifth PCR alleging that the trial court lacked subject matter jurisdiction over his armed robbery charge, and his sentence was illegal, and that the indictment failed to charge the essential elements of armed robbery. The trial court appointed counsel to represent Mann, and an evidentiary hearing was held on May 9, 2013. The trial court then dismissed the motion, finding it is quite clear the Mann was pleading guilty to murder and armed robbery. He appealed.

HELD: Mann was indicted for capital murder with the underlying felony of robbery. He now alleges the indictment did not allege the essential elements of armed robbery. He argues that since he was never indicted for armed robbery, the trial court lacked subject-matter jurisdiction; therefore, he was subjected to an illegal sentence. This issue has been raised previously in Mann's other PCRs decided by the MSSCT. "As an intermediate appellate court, we are not at liberty to overrule the supreme court's decision." Mann's claims are procedurally barred.

To read the full opinion, click here:
http://courts.ms.gov/Images/Opinions/CO104984.pdf

July 21, 2015

William Dewayne Savell v. State, No. 2014-CP-01290-COA (Miss.Ct.App. July 21, 2015)

CASE: PCR – Murder
SENTENCE: Life

COURT: Neshoba County Circuit Court
TRIAL JUDGE: Hon. Marcus D. Gordon

APPELLANT ATTORNEY: William Dewayne Savell (Pro Se)
APPELLEE ATTORNEY: Scott Stuart

DISPOSITION: Dismissal of PCR Affirmed. Carlton, J., for the Court. Lee, C.J., Irving and Griffis, P.JJ., Barnes, Ishee, Maxwell and Fair, JJ., Concur. James, J., Concurs in Part Without Separate Written Opinion. Wilson, J., Not Participating.

ISSUE: Whether the trial judge erred in treating his motion as a PCR and dismissing it as procedurally barred.

FACTS: William Savell was convicted of the 2003 murder of Mandy Davis. His conviction was affirmed on appeal. ***Savell v. State***, 928 So. 2d 961 (Miss. Ct. App. 2006). After filing several other unsuccessful motions, Savell filed a "Petition for Order to Show Cause" with the circuit court. He claimed the motion was not a PCR, but sought the transcript of a pretrial hearing in his case. Savell disputed the circuit court's seizure of his motorcycle, which he claims he intended to sell to use the proceeds to hire a defense attorney for his trial. Savell argued that the circuit court's refusal to provide him with a copy of that transcript impaired his ability to appeal and violated his due-process rights. The court treated the motion as a PCR and dismissed it as time barred. The court also found Savell failed to obtain permission from the supreme court to file, so the court lacked jurisdiction to consider Savell's motion. Savell appealed.

HELD: Despite Savell's assertions that his petition presents an independent original action, the circuit court found that his petition for a show-cause order constituted a PCR that sought to challenge the testimony and evidence the State used to convict Savell of Davis's murder. Savell also failed to cite any authority to show that he is entitled to a free transcript when filing an independent original action. As a PCR, he needed permission before filing since his case was considered on direct appeal. The trial judge did not err in dismissing his motion.

To read the full opinion, click here:
http://courts.ms.gov/Images/Opinions/CO104696.pdf

Scooter L. Robinson v. State, No. 2014-CP-00794-COA (Miss.Ct.App. July 21, 2015)

CASE: PCR – Possession of a Precursor Chemical, Possession of a Controlled Substance with Intent to Distribute, and Felony Fleeing.
SENTENCE: A total of 35 years with 11 to serve

COURT: Pearl River County Circuit Court
TRIAL JUDGE: Hon. Anthony Alan Mozingo

APPELLANT ATTORNEY: Scooter L. Robinson (Pro Se)
APPELLEE ATTORNEY: Jeffrey A. Klingfuss

DISPOSITION: Dismissal of PCR Affirmed. Griffis, P.J., for the Court. Lee, C.J., Irving, P.J., Barnes, Ishee, Carlton, Maxwell, Fair, and James, JJ., Concur. Wilson, J., Not Participating.

ISSUES: Whether the trial judge erred in dismissing his PCR as time-barred.

FACTS: On July 13, 2009, Scooter Robinson pled guilty to possession of a precursor chemical, possession of a controlled substance with intent to distribute, and felony fleeing. Robinson filed a PCR on April 2, 2014. In his motion, Robinson alleged ineffective assistance of counsel, due-process-rights violations, and cumulative error. The circuit court dismissed the PCR as time-barred. Robinson appealed.

HELD: Robinson's motion is clearly time barred. He fails to cite any exception to the time bar. Robinson instead argued his ineffective-assistance-of-counsel and due-process-violation claims are

constitutional exceptions to the time-bar. Although Robinson cited to *Strickland*, he does not proffer any evidence that his counsel's performance met either *Strickland* requirement. Robinson provided insufficient evidence to support a finding of an ineffective-assistance claim.

Within his ineffective assistance claim, Robinson claimed he was subjected to double-jeopardy since his sentence of post-release supervision in addition to his sentence to serve in prison constituted multiple punishments for the same crime. However, placing a defendant on post-release supervision in addition to imposing a prison sentence does not constitute double jeopardy.

Robinson also contends his confinement conditions in the Pearl River County jail violated his due-process rights. Robinson merely offered unsupported allegations of the prison conditions. Robinson failed to provide sufficient evidence of any due-process violation. He can certainly pursue administrative remedies.

To read the full opinion, click here:
http://courts.ms.gov/Images/Opinions/CO104554.pdf

Tommy Vitela, Sr. v. State, No.2014-CP-00797-COA (Miss.Ct.App. July 21, 2015)

CASE: PCR – Lustful Touching of a child.
SENTENCE: 8 years, suspended, and 4 of PRS

COURT: Lauderdale County Circuit Court
TRIAL JUDGE: Hon. Lester F. Williamson Jr.

APPELLANT ATTORNEY: Tommy Vitela Sr. (Pro Se)
APPELLEE ATTORNEY: Laura H. Tedder

DISPOSITION: Dismissal of PCR Affirmed. Griffis, P.J., for the Court. Lee, C.J., Irving, P.J., Barnes, Ishee, Carlton, Maxwell, Fair and James, JJ., Concur. Wilson, J., Not Participating.

ISSUE: Whether the trial court erred in finding Vitela's PCR procedurally barred.

FACTS: Tommy Vitela entered a best interests plea to lustful touching. While on PRS, Vitela was indicted for sale and possession of hydrocodone and acetaminophen with intent to distribute. Vitela pled guilty to those charges. Vitela also signed an agreed order for the revocation of his suspended sentence from the his lustful touching 2008 conviction, and he received an additional eight years to serve. The circuit court entered the orders and sentenced Vitela on August 24, 2010. On January 22, 2014, Vitela filed a PCR. The motion included claims from his 2008 and his 2010 convictions. Vitela also claimed that each of his grounds of relief affected his fundamental constitutional rights, which excepted his PCR from the procedural time-bar. On June 30, 2014, the circuit court dismissed Vitela's petition as time-barred. The circuit court further found Vitela's petition was procedurally improper in that Vitela sought relief from both his 2008 and 2010 convictions. Though the circuit court ruled the procedural bars applied, the circuit court also found his claims without merit. He appealed.

HELD: Vitela's PCR petition was improper, as it attacked two separate convictions. It was also time barred as to both convictions. Vitela does not claim any of the statutory exceptions to the procedural time-bar exist. While Vitela argued an undated affidavit executed after his 2008 conviction served to exculpate him, he does not assert the affidavit meets the new-evidence exception.

Vitela alleged his claims of ineffective assistance of counsel, an illegal sentence, and an involuntary plea implicate his fundamental constitutional rights. However, a claim of an involuntary guilty plea does not constitute a violation of a fundamental right. As to his claim of ineffective assistance, Vitela cites to *Strickland*, he does not proffer any evidence that his counsel's performance met either *Strickland* requirement. Vitela provided insufficient evidence to support a finding of ineffective assistance. Finally, Vitela's sentence was not illegal. Time served on PRS does not count as time served in incarcerataion.

To read the full opinion, click here:
http://courts.ms.gov/Images/Opinions/CO104853.pdf

Rickey Gavin v. State, No. 2014-CP-01291-COA (Miss.Ct.App. July 21, 2015)

CASE: PCR – Capital Murder
SENTENCE: Life

COURT: Jones County Circuit Court
TRIAL JUDGE: Hon. Billy Joe Landrum

APPELLANT ATTORNEY: Rickey Gavin (Pro Se)
APPELLEE ATTORNEY: John R. Henry, Jr.

DISPOSITION: Dismissal of PCR Affirmed. Maxwell, J., for the Court. Lee, C.J., Irving and Griffis, P.JJ., Barnes, Ishee, Carlton, Fair and James, JJ., Concur. Wilson, J., Not Participating.

ISSUES: (1) Whether the trial judge erred in finding the motion procedurally barred, and (2) whether his indictment was defective.

FACTS: In 2009, Ricky Gavin pled guilty to capital murder and was sentenced to life. He filed a PCR in 2010, which was denied and affirmed on appeal. He filed a second PCR in 2014, which was dismissed as procedurally barred. Gavin again appealed.

HELD: (1) The circuit judge properly held that Gavin's second PCR was procedurally barred. It was both time barred and successive writ barred.

(2) Gavin claimed the indictment failed to charge—or improperly charged—the elements of capital murder and the underlying robbery. His voluntary guilty plea waived any defects in the indictment. Gavin's indictment not only identified the predicate felony as robbery and listed the section of the statute under which he was charged, but it also laid out the robbery elements. So capital-murder was sufficiently pled, and his indictment was not defective. Listing the personal property taken and the specific weapon used are not required.

To read the full opinion, click here:
http://courts.ms.gov/Images/Opinions/CO104669.pdf

July 28, 2015

William Antonio Avery (II) v. State, No. 2014-CP-00768-COA (Miss.Ct.App. July 28, 2015)

CASE: PCR – Possession of Meth
SENTENCE: 15 years, with 10 suspended, 5 years to serve, and 5 years of probation

COURT: Lauderdale County Circuit Court
TRIAL JUDGE: Hon. Lester F. Williamson Jr.

APPELLANT ATTORNEY: William Antonio Avery (Pro Se)
APPELLEE ATTORNEY: Stephanie Breland Wood

DISPOSITION: Denial of PCR Affirmed. Barnes, J., for the Court. Lee, C.J., Irving and Griffis, P.JJ., Ishee, Carlton, Maxwell, Fair and James, JJ., Concur. Wilson, J., Not Participating.

ISSUE: Whether the trial judge erred in dismissing Avery's second PCR as procedurally barred.

FACTS: On May 20, 2003, Avery entered a blind plea of guilty to the crime of possession of 41.5 grams of methamphetamine. In April 2010, Avery violated the conditions of his parole by being charged with sale of cocaine and felony fleeing. In October 2010, the trial court revoked Avery's probation and sentenced him to serve the remainder of his 15-year sentence. In March 2011, Avery filed an untimely PCR, arguing a double-jeopardy claim, and that his counsel rendered ineffective assistance by failing to object to the trial court's imposition of this "illegal sentence." The PCR was denied as time-barred, and was affirmed on appeal. In February 2014, Avery filed a second PCR, arguing that he was denied due process because the judge changed his agreement of a 5 year cap to a 15 year sentence. The trial judge denied the second PCR as time barred and successive writ barred. Avery appealed.

HELD: "We agree with the trial court that Avery's PCR motion is time-barred, successive, and substantively without merit." No statutory exceptions apply to the procedural bar. Even addressing the merits of Avery's "fundamental rights" argument, Avery's plea petition acknowledged he could have been sentenced to 120 years, but he agreed to an amended charge of simple possession, limiting the maximum sentence to 30 years. He also acknowledged that it was a "blind plea." He understood the court was not bound by any agreement with the State, but did the court did cap his sentence at five years to serve. The sentencing order is consistent with the plea petition and agreed order.

When his probation was revoked in 2010, the trial court did not violate Avery's due-process rights by imposing his suspended sentence of ten years, which was set forth in the plea petition, agreed order, and sentencing order. He was not misled.

To read the full opinion, click here:

http://courts.ms.gov/Images/Opinions/CO105007.pdf

Bobby C. Sanders, Jr. v. State, No. 2014-CP-01208-COA (Miss.Ct.App. July 28, 2015)

CASE: PCR – Armed Robbery
SENTENCE: 40 years, with 5 years suspended and 35 to serve

COURT: Madison County Circuit Court
TRIAL JUDGE: Hon. William E. Chapman, III

APPELLANT ATTORNEY: Bobby C. Sanders Jr. (Pro Se)
APPELLEE ATTORNEY: Scott Stuart

DISPOSITION: Dismissal of PCR Affirmed. Lee, C.J., for the Court. Irving and Griffis, P.JJ., Barnes, Ishee, Carlton, Maxwell, Fair and James, JJ., Concur. Wilson, J., Not Participating.

ISSUES: Whether the trial judge erred in finding Sanders's PCR time-barred, and whether the court abused its discretion in failing to grant an evidentiary hearing.

FACTS: On February 27, 2002, Bobby C. Sanders Jr. pleaded guilty to armed robbery. On August 8, 2014, Sanders filed a motion entitled "petition for writ of habeas corpus [and] motion to vacate conviction and sentence." Treating this as a petition for postconviction relief, the trial court dismissed Sanders's petition finding it was time-barred. Sanders appealed, contending his case is excepted from the time-bar based on newly discovered evidence.

HELD: Sanders claimed a new affidavit from one of his co-defendants, Gerome Moore, was exculpatory, as Moore claimed that Sanders were not present during the robbery. However, at the time of his trial, Moore said Sanders was involved. Moore's current affidavit does not meet the definition of newly discovered evidence. Sanders cannot show that this affidavit from Moore would change the result if a new trial was granted. Any testimony from Moore would be impeached by his sworn testimony at his own trial as well as his pretrial statements that Sanders was involved. Since there is no exception to the time-bar, the trial court did not abuse its discretion in failing to conduct an evidentiary hearing.

To read the full opinion, click here:
http://courts.ms.gov/Images/Opinions/CO105021.pdf

August 4, 2015

Antwine Equality Graves v. State, No. 2013-CA-01619-COA (Miss.Ct.App. August 4, 2015)

CASE: PCR – Murder
SENTENCE: Life w/o parole as an habitual offender

COURT: Harrison County Circuit Court
TRIAL JUDGE: Hon. Lawrence Paul Bourgeois, Jr.

APPELLANT ATTORNEY: Michael W. Crosby
APPELLEE ATTORNEY: Laura Hogan Tedder

DISPOSITION: Denial of PCR Affirmed. Maxwell, J., for the Court. Lee, C.J., Irving and Griffis, P.JJ., Barnes, Ishee, Carlton, Fair and James, JJ., Concur. Wilson, J., Not Participating.

ISSUES: Whether the trial judge erred in failing to grant post-conviction relief based on recanted testimony.

FACTS: Antwine Equality Graves was convicted of murder and was sentenced to life without parole. On January 13, 2001, Graves went to the Blue Note Lounge in Biloxi. Graves later got into an argument with Marlon Bland. Graves left the Blue Note and went outside followed by Marlon, Marlon's brother Daray, and Shawn Miami Johnson. Testimony was disputed but ultimately someone shot Marlon in the neck. Daray testified that once they were outside, Marlon pushed Graves because he had a pistol in his hand. Graves caught his balance and walked up and shot Marlon in the neck. Willie Fairly testified that he saw Graves make a step, and Graves reached around Daray and shot Marlon in the neck. He stated that he saw Graves holding a pistol and heard Daray say to Graves, "you shot my brother." Graves argued that he was not the shooter and presented witnesses who corroborated his version of events. Graves testified that Johnson shot Marlon. Graves was later convicted and his appeal was affirmed. ***Graves v. State***, 914 So. 2d 788 (Miss. Ct. App. 2005). Graves was later granted permission to file a PCR based on affidavit by Willie Fairly recanting his trial testimony that he saw Graves shoot Marlon. At an evidentiary hearing, Fairly testified that he was in the club during the shooting, so he did not really see who shot Marlon. He stated he felt pressure from Marlon's family to name Graves, however he said he was pressured by police in his affidavit. The affidavit was prepared by Graves's PCR attorneys. The trial judge did not believe Fairley's recanted testimony and denied the PCR. He appealed.

HELD: The mere fact a trial witness later recants does not itself necessitate a new trial. The trial judge held an evidentiary hearing, but was not satisfied with Fairley's testimony was truthful. "This decision was certainly within the judge's prerogative." Also telling was Fairley's admission that he only came forward after one of Graves's PCR lawyers approached him with a pre-made affidavit a decade after Graves's conviction.

Fairley was not the lone witness who testified at Graves's murder trial that Graves was the shooter. Both Fairley and Daray testified that they saw Graves shoot Marlon. Daray did not recant. Graves failed to show that absent Fairley's testimony, the trial's result would have been different. As the circuit judge's denial was supported by substantial evidence and was not clearly erroneous, it was affirmed.

To read the full opinion, click here:
http://courts.ms.gov/Images/Opinions/CO105044.pdf

August 11, 2015

Ronnie L. Boyd (Ronnie) v. State, No. 2013-CA-02046-COA (Miss.Ct.App. August 11, 2015)

CASE: PCR – Bribery
SENTENCE: 10 years as an habitual offender

COURT: Oktibbeha County Circuit Court
TRIAL JUDGE: Hon. Lee J. Howard

APPELLANT ATTORNEY: Bennie L. Jones, Jr., Roberta Lynn Haughton
APPELLEE ATTORNEY: Barbara Wakeland Byrd

DISPOSITION: Denial of PCR Affirmed. James, J., for the Court. Irving and Griffis, P.JJ., Barnes, Ishee, Carlton, Maxwell, Fair and Wilson, JJ., Concur. Lee, C.J., Not Participating.

ISSUES: (1) Whether his guilty plea was involuntarily due to illness or health problems; and (2) whether his trial counsel was ineffective because (a) she failed to adequately inquire into his health issues and present evidence concerning them to the trial court at the time of the guilty plea; and (b) she failed to advise Boyd of a plea offer by the State prior to his trial date.

FACTS: On January 28, 2009, after a jury had been seated to try Ronnie Boyd for bribery, tampering with evidence and drug possession, he withdrew his not guilty plea and entered a plea of guilty to one count of bribery. The other charges were retired to the file and he was sentenced. On January 26, 2012, Boyd filed a PCR. On May 22, 2012, Boyd filed an amended PCR motion. Boyd argued that his guilty plea was involuntary due to "serious health problems" that he was experiencing at the time of his plea. Additionally, Boyd argued that his trial counsel was ineffective because she failed to inquire about his health issues and failed to present evidence at the plea hearing concerning his health issues. After an evidentiary hearing, the trial judge denied relief and Boyd appealed.

HELD: (1) Boyd's plea was voluntary. The trial court questioned Boyd at length and found that Boyd was competent to enter a plea of guilty, and that he understood the charges against him, the nature and consequences of his plea of guilty, as well as the maximum and minimum sentences required by law. Boyd offered no evidence that any of his alleged health conditions made him incompetent to enter a plea of guilty on January 28, 2009. His health did not prevent him from being able to run a car-sales business.

(2) During the plea colloquy, Boyd stated he was satisfied with his attorney. At the evidentiary hearing, counsel testified that she asked Boyd whether his mental and physical health was presently satisfactory. Boyd gave her no indication or reason to believe he was incompetent. Boyd's argument is without merit.

Boyd also argued in his brief that his attorney failed to convey a plea offer to him prior to the date of his trial. This was not raised with the trial court, so it is barred on appeal. Regardless, counsel testified that the State made an offer pretrial, which was less than ten years. They discussed it and Boyd refused and insisted on getting a continuance instead. Boyd has failed to provide any evidence, other than his own statements, to support his theory of ineffective assistance of counsel.

To read the full opinion, click here:
http://courts.ms.gov/Images/Opinions/CO105632.pdf

Percy Hawthorne v. State, No. 2014-CP-00363-COA (Miss.Ct.App. August 11, 2015)

CASE: PCR – Possession of Cocaine with intent, Possession of Marijuana with intent, and Possession of a Firearm as a Convicted Felon x2
SENTENCE: A total of 30 years as an habitual offender

COURT: Harrison County Circuit Court
TRIAL JUDGE: Hon. John C. Gargiulo

APPELLANT ATTORNEY: Percy Hawthorne (Pro Se)
APPELLEE ATTORNEY: Lisa L. Blount

DISPOSITION: Denial of PCR Affirmed. Barnes, J., for the Court. Lee, C.J., Irving and Griffis, P.JJ., Ishee, Carlton, Maxwell, Fair, James and Wilson, JJ., Concur.

ISSUES: (1) Whether his indictment was defective because it failed to state an amount of cocaine he possessed, (2) whether law enforcement lacked probable cause to enter his home and seize the drugs and weapons at issue, and (3) whether he received ineffective assistance of counsel and was denied other constitutional protections.

FACTS: In April 2011, Percy Hawthorne was indicted for possession of cocaine with intent to distribute, possession of marijuana with intent to distribute, and two counts of a felon in possession of a firearm, all as a habitual offender. He was also indicted as a subsequent drug offender. Hawthorne entered an open plea of guilty for all four counts. In January 2014, Hawthorne filed a PCR, which the trial judge denied. Hawthorne appealed and filed a pro se brief making the same arguments as he did in his PCR before the trial court. In October 2014, he filed another brief with this Court raising the same issues, as well as constitutional violations related to a speedy trial, the right to confront the State's witnesses, and ineffective assistance of counsel.

HELD: (1) Hawthorne claimed that Count 1 of his indictment was defective because it did not have the quantity of cocaine he allegedly possessed and intended to distribute. The claim is without merit, as there is no requirement that the quantity of cocaine be listed in the indictment for possession with intent.

(2) Hawthorne claimed that law enforcement officers entered his house, without probable cause, and illegally seized drugs and weapons without a warrant in violation of his 4th Amendment rights. However, Hawthorne entered a valid guilty plea, so all potential challenges to the evidence were waived.

(3) Hawthorne also alleged in his brief that he received ineffective assistance of counsel, and was denied a speedy trial as well as the right to confront and cross-examine the State's witnesses. These issues were not presented to the trial court, so they are barred on appeal.

To read the full opinion, click here:
http://courts.ms.gov/Images/Opinions/CO105262.pdf

Eric LaQuinne Brown v. State, No. 2014-CP-00434-COA (Miss.Ct.App. August 11, 2015)

CASE: PCR – Murder and Manslaughter
SENTENCE: Life for the murder and 20 years for the manslaughter

COURT: Pontotoc County Circuit Court
TRIAL JUDGE: Hon. Thomas J. Gardner, III

APPELLANT ATTORNEY: Eric Laquinne Brown (Pro se)
APPELLEE ATTORNEY: John R. Henry, Jr., Scott Stuart

DISPOSITION: Denial of PCR Affirmed. Maxwell, J., for the Court. Irving and Griffis, P.JJ., Barnes, Ishee, Fair and Wilson, JJ., Concur. Carlton, J., Concurs in Result Only Without Separate Written Opinion. James, J., Dissents with Separate Written Opinion. Lee, C.J., Not Participating.

ISSUES: (1) Whether ***Sanders v. State***, 9 So. 3d 1132 (Miss. 2009), which mandated an on-the-record competency hearing when the trial court has ordered a psychological exam, applies retroactively; (2) whether he had "newly discovered evidence;" and (3) whether there was a sufficient factual basis for his guilty plea.

FACTS: Eric Laquinne Brown pled guilty in November of 1999 to charges of murder and manslaughter. Brown murdered his pregnant girlfriend, Shorelonda Moore. He was sentenced to life for the murder and 20 years for manslaughter of the unborn child. This is Brown's 4th post-conviction petition. He has also filed several motions in the MSSCT which have all been denied. In his PCR, Sanders claimed he was given a mental examination to determine his competency for trial, but that the trial judge never conducted a formal competency hearing. The trial judge denied relief and Brown appealed.

HELD: (1) Brown claimed that under *Sanders*, since he underwent a court-ordered mental exam, the trial court had to conduct a formal competency hearing before accepting his guilty plea. First, Brown is correct that he has a due-process right not to stand trial or be convicted while incompetent This is a fundamental right so his claim is not barred. However, the Court found no due process violation.

The *Sanders* decision is not retroactive. The MSSCT interpreted URCCCP Rule 9.06 to mandate a formal competency hearing once a trial court orders a psychiatric evaluation to determine competency to stand trial. Because this ruling was procedural in nature, it does not apply retroactively. Regardless, Brown was found competent to stand trial. Had some sort of formal competency hearing occurred, it is reasonable to conclude the State would have introduced the evaluation report into evidence.

Brown's guilty plea was valid when entered. He was informed of all of the rights he forfeited by pleading guilty. Brown sworn under oath that he had never been treated for any mental disease or psychiatric illness and fully understood what was occurring in the courtroom. Brown denied any history of mental disease or psychiatric illness. Neither he nor his attorney voiced any objections to the State's statement that Brown was found competent. "And now, fifteen years later, Brown presents no persuasive reason for us to doubt the trial judge's finding."

(2) After his convictions, Brown sued three Ponotoc police officers involved in his arrest. He claimed that certain facts came to light during the 2008 federal civil trial that, had he had known them back in 1999, he would not have pled guilty. Brown has failed to show that the evidence he refers to as "new" was not reasonably discoverable in 1999. Brown fails to show how an initial lack of probable cause to arrest equates to his innocence in the murder case.

(3) Brown claimed there was no factual basis for his plea because he never specifically admitted he strangled Shorelanda with a bra. "But a factual basis is not insufficient simply because the defendant does not confess each gory detail of the crime." Brown admitted he deliberately killed Shorelanda. The prosecutor told the court that Brown had admitted he argued with Shorelanda, that he shook her until she was no longer responsive, and that he then went home and told his wife that he had killed Shorelanda and needed to dispose of her body. Brown then drove Shorelanda's body to Memphis, where he attempted to burn Shorelanda's car. This was more than sufficient to establish a factual basis for the plea under Rule 8.04(A)(3).

James, J., Dissenting:

Judge James dissented, arguing that since the trial court failed to conduct a competency hearing mandated by Rule 9.06, after ordering two separate psychiatric evaluations, only one of which was actually performed, the case should be reversed. Brown must either be retried or institutionalized following a mental evaluation and competency hearing.

To read the full opinion, click here:
http://courts.ms.gov/Images/Opinions/CO106530.pdf

August 18, 2015

David Paul Anderson v. State, No. 2014-CA-00323-COA (Miss.Ct.App. August 18, 2015)
[opinion from 03/31/2015 modified on rehearing - no significant changes]

CASE: PCR – Statutory Rape and Sexual Battery
SENTENCE: 2 concurrent life sentences

COURT: Harrison County Circuit Court
TRIAL JUDGE: Hon. Lawrence Paul Bourgeois Jr.

APPELLANT ATTORNEY: Thomas C. Levidiotis
APPELLEE ATTORNEY: Scott Stuart

DISPOSITION: Denial of PCR Affirmed. Fair, J., for the Court. Lee, C.J., Irving and Griffis, P.JJ., Barnes, Ishee, Carlton, Maxwell, James and Wilson, JJ., Concur.

ISSUES: (1) Whether the trial court erred in granting summary judgment for the State, and (2) whether his sentence was excessive.

FACTS: John Paul Anderson was convicted of the statutory rape and sexual battery of his eleven-year-old daughter. His convictions and sentences were affirmed on direct appeal. ***Anderson v. State***, 62 So. 3d 927 (Miss. 2011). Anderson requested and received leave of the SCT to file a PCR to advance his claims that he lacked the mental capacity to commit the crimes or to assist in his own defense. Although granted an evidentiary hearing, Anderson's counsel indicated he was amendable to deciding the case on the record. The circuit court subsequently denied relief without specifically stating it was granting the State's motion for summary judgment. Anderson appealed.

HELD: (1) The trial court did not err in denying relief. Summary judgment is not prohibited when the SCT grants leave to file a PCR. Further, Anderson's claim is founded almost entirely on a childhood IQ test score of 69 conducted in 1974, when Anderson was about 14 years old. However the tests results indicated his full scale IQ was brought down by his verbal skills tests which appeared the be caused by a speech impediment. The results of an examination conducted after he filed his PCR were never made part of the record. Anderson failed to produce evidence sufficient to create a genuine issue of material fact on any of his claims.

(2) Anderson could have raised this issue on direct appeal. The claim was procedurally barred and barred by res judicata. The issue is also without merit.

To read the full opinion, click here:
http://courts.ms.gov/Images/Opinions/CO102156.pdf

September 15, 2015

Michael Haynes v. State, No. 2013-CP-02058-COA (Miss.Ct.App. September 15, 2015)

CASE: PCR – Grand Larceny/Sexual Battery
SENTENCE: 30 years

COURT: Lincoln County Circuit Court
TRIAL JUDGE: Hon. Michael M. Taylor

APPELLANT ATTORNEY: Michael Haynes (Pro Se)
APPELLEE ATTORNEY: Jeffrey A. Klingfuss

DISPOSITION: Dismissal of PCR Affirmed. Wilson, J., for the Court. Lee, C.J., Irving and Griffis, P.JJ., Barnes, Ishee, Carlton, Maxwell, Fair and James, JJ., Concur.

ISSUE: Whether the trial judge erred in dismissing petitioner's motion for transcripts and records.

FACTS: Michael Haynes pled guilty to grand larceny in 1991. Haynes later filed a PCR, which the circuit court denied. Haynes did not timely appeal. In 1992, Haynes completed his grand larceny sentence and was released. In 1993, Haynes was convicted on multiple counts of sexual battery. Haynes has since sought leave to pursue post-conviction at least six different times. In 2011, Haynes sought permission to file an out-of-time appeal from his 1991 grand larceny conviction. The circuit court denied his motion, and the Supreme Court affirmed. On August 12, 2013, Haynes filed a motion

for records and transcripts related to his sexual battery convictions. The circuit court dismissed Haynes's motion with prejudice. Haynes filed a notice of appeal, which included various documents, information, and transcripts from the grand larceny case. The circuit court denied his requests, finding that the documents were irrelevant to his motion for transcripts and records. Haynes's brief on appeal raises only a series of direct, substantive challenges to his 1991 guilty plea in the grand larceny case, and does not motion his requests for transcripts.

HELD: Haynes has since sought leave to pursue post-conviction relief attacking his sexual battery sentence at least six different times. The post-convictions statutes do not give a prisoner the right to institute an independent, original action for transcripts and records. Regardless of whether his motion for records and transcripts related to his conviction for sexual battery or grand larceny, the circuit court properly denied the motion, and the appeal was dismissed for lack of jurisdiction.

To read the full opinion, click here:
http://courts.ms.gov/Images/Opinions/CO106244.pdf

September 29, 2015

James Hilliard v. State, No. 2014-CA-01028-COA **(**Miss.Ct.App. September 29, 2015)

CASE: PCR – Conspiracy to sell a controlled substance (cocaine)
SENTENCE: 17 years with 15 years to serve in MDOC as a habitual offender and 2years of PRS

COURT: Lafayette County Circuit Court
TRIAL JUDGE: Hon. Andrew K. Howorth

APPELLANT ATTORNEY: Jonathan W. Martin
APPELLEE ATTORNEY: Barbara Wakeland Byrd

DISPOSITION: Dismissal of Motion for Post-Conviction Relief, Affirmed. Carlton, J., for the Court. Lee, C.J., Irving and Griffis, P.JJ., Barnes, Ishee, Maxwell, Fair, James and Wilson, JJ. Concur.

ISSUES: (1) Whether the circuit court erred by dismissing his ineffective-assistance-of-counsel claim without an evidentiary hearing; and (2) whether his sentencing as a habitual offender is illegal.

FACTS: On December 1, 2009, law enforcement officers stopped a vehicle containing James Hilliard and two other passengers. After obtaining a search warrant, authorities searched the vehicle and discovered cocaine. On February 18, 2011, a grand jury indicted Hilliard for Count I, conspiracy to sell a Schedule II controlled substance (cocaine), and Count II, possession of a Schedule II controlled substance (cocaine). On July 16, 2012, after losing a suppression motion and the State moving to amend the indictment to charge Hilliard as a habitual offender, he pled guilty pursuant to a negotiated plea. Hilliard acknowledged in his plea petition that he had previously been convicted of "[two] felonies in the State of California." The petition reflected that Hilliard signed the petition in the presence of his attorney and he agreed to plead guilty as a habitual offender to the conspiracy charge of his indictment if the State recommended that the circuit court dismiss the possession charge.

Hilliard was sentenced to 15 years to serve as a habitual offender and filed a motion for post-conviction relief in the circuit court. That motion was dismissed and Hilliard appealed.

HELD: (1) According to Hilliard, he would not have pled guilty to the conspiracy charge or waived his right to a speedy trial if his attorney had properly advised him. Hilliard argues that the record reflects no dispute as to any of the facts alleged in his PCR motion, and he contends that the circuit court therefore erred by dismissing his ineffective-assistance-of-counsel claim without an evidentiary hearing. The record in the present case fails to reflect that Hilliard possessed a meritorious speedy-trial claim. Furthermore, Hilliard's plea colloquy shows that he was fully advised by his attorney and was satisfied with his attorney's legal services. As the record reflects, the State indicted Hilliard on February 18, 2011. On October 10, 2011, Hilliard waived arraignment and entered a plea. His claim has no merit.

(2) Hilliard argues that he never pled guilty to the habitual-offender portion of the indictment, and he contends that the circuit court never found that such a guilty plea was freely and voluntarily given and accepted. Hilliard further asserts that the circuit court failed to hold a bifurcated hearing for the State to prove beyond a reasonable doubt that he was a habitual offender. According to the transcript, Hilliard acknowledged his two prior felony convictions in California and stipulated that these prior convictions qualified him for sentencing as a habitual offender. Furthermore, the hearing transcript of Hilliard's plea colloquy reflects that he freely, voluntarily, and knowingly entered his guilty plea. The circuit court did not err in sentencing Hilliard as a habitual offender.

To read the full opinion, click here:
http://courts.ms.gov/Images/HDList/..%5COpinions%5CCO106784.pdf

Barron Lecour Borden v. State, No. 2014-CP-00558-COA (Miss.Ct.App. September 29, 2015)

CASE: PCR – Capital Murder and Third-Degree Arson
SENTENCE: Life Without Parole and 3 years to serve concurrently

COURT: Jackson County Circuit Court
TRIAL JUDGE: Hon. Dale Harkey

APPELLANT ATTORNEY: Barron Borden (Pro Se)
APPELLEE ATTORNEY: Lisa L. Blount

DISPOSITION: Dismissal of Motion for Post-Conviction Relief, Affirmed. Barnes, J., for the Court. Lee, C.J., Irving and Griffis, P.JJ., Ishee, Carlton, Maxwell, Fair, James and Wilson JJ., Concur.

ISSUES: (1)Whether he was subjected to double jeopardy, as he was convicted for the same crime in both federal and state jurisdictions; and (2) Whether his counsel was ineffective for failing to raise this double jeopardy issue.

FACTS: Barron Borden, Eddie Pugh, and Torenda Whitmore were indicted for the capital murder of Kelsey McCoy, with the underlying felony of kidnapping; aggravated assault of Rahman Mogilles; and third-degree arson of Mogilles's vehicle. On October 8, 2008, Borden and Pugh were convicted in the

United States District Court for the District of Southern Mississippi of the following federal offenses: (1) conspiring to commit kidnapping; (2) kidnapping and aiding and abetting the kidnapping of McCoy; (3) kidnapping and the aiding and abetting of the kidnapping of Mogilles; (4) felon in possession of a firearm; and (5) possession of a firearm in connection with a crime of violence. *See United States v. Pugh*, No. 1:08-CR-00130-WJG-RHW, 2009 WL 2928757, at *1 (S.D. Miss. Sept. 11, 2009). Both Borden and Pugh were sentenced to life, plus five years. On January 6, 2011, Borden entered a guilty plea in the Jackson County Circuit Court to capital murder and an *Alford* plea to third-degree arson. Borden filed a PCR on January 24, 2012 which was dismissed by the circuit court and that dismissal was affirmed by the COA. He then filed another PCR on February 14, 2014 that was dismissed by the circuit court on April 1, 2014. He now appeals that latest dismissal.

HELD: The issues raised by Borden on appeal have no merit: (1) While the acts committed by Borden arose from of the same set of facts and circumstances, they constitute violations of the laws of two separate sovereigns. Therefore it was not a double jeopardy violation when Borden was tried and convicted of the same crimes in federal court as he was convicted of in state court.

(2) Since there is no double jeopardy violation, Borden's counsel was not ineffective in failing to raise the double jeopardy issue.

To read the full opinion, click here:
http://courts.ms.gov/Images/HDList/..%5COpinions%5CCO106871.pdf

COA MISCELLANEOUS CASES

Ravel Williams v. State, No. 2013-KA-01986-COA (Miss.Ct.App. April 14, 2015)

CASE: Petition for Relief from Duty to Register as a Sex Offender

COURT: Coahoma County Circuit Court
TRIAL JUDGE: Hon. Johnnie E. Walls Jr.

APPELLANT ATTORNEY: Azki Shah
APPELLEE ATTORNEY: Jeffrey A. Klingfuss
DISTRICT ATTORNEY: Brenda Fay Mitchell

DISPOSITION: Dismissal of Petition for Relief from Duty to Register as a Sex Offender Dismissed. Griffis, P.J., for the Court. Lee, C.J., Irving, P.J., Barnes, Ishee, Roberts, Carlton, Maxwell, Fair and James, JJ., Concur.

ISSUES: (1) Whether the sex-offender-registration statute violates the Ex Post Facto Clause of the Mississippi Constitution, and (2) whether Williams meets the criteria in §45-33-23(h)(ii) for exemption from registration as a sex offender.

FACTS: Ravel Deon Williams filed a petition for relief from registration as a sex offender. Williams pled guilty to sexual battery for having sex with a child under the age of 14 while he was between 14 and 16. He was sentenced to 12 years with 6 suspended. He was discharged in 1995, and release from

PRS in 2000. Williams complied with the sex offender registration requirements, but filed a petition to be relieved from future registration requirements. The circuit court denied the petition and Williams appealed.

HELD: (1) Williams argued the registration requirement violates the Ex Post Facto Clause of the Mississippi Constitution. Williams contends the registration requirements, which limit his job prospects, housing options, and recreational and daily activities, serve as a punitive measure in addition to his original sentence. It also subjects him to additional prison time for failure to comply. However, both the SCOTUS and the MSSCT have found the requirements of registration constitute a civil, non-punitive regulatory scheme, not a new criminal punishment. The claim is without merit.

(2) Williams alternatively argued that if the Court found the sex-offender-registration requirement constitutional, he meets an exemption to the registration requirement outlined in section 45-33-23(h)(ii). Williams does not meet the exception. Even though he was under 18 at the time of the offense, his victim was under 14. Williams is a tier-three offender under §45-33-47. He may be entitled to exemption in the future, but his current petition was untimely.

To read the full opinion, click here:
http://courts.ms.gov/Images/Opinions/CO101647.pdf

Khristoffer Mandell Hearron v. State, No. 2013-CP-01855-COA (Miss.Ct.App. June 2, 2015)

CASE: Civil - Request for TRO against MDOC

COURT: Jefferson County Circuit Court
TRIAL JUDGE: Hon. Lamar Pickard

APPELLANT ATTORNEY: Khristoffer Mandell Hearron (Pro Se)
APPELLEE ATTORNEY: Anthony Louis Schmidt Jr.

DISPOSITION: Dismissal of Petitioner's Motion for a Temporary Restraining Order Against the MDOC Affirmed. Ishee, J., for the Court. Lee, C.J., Irving and Griffis, P.JJ., Barnes, Roberts, Carlton, Maxwell and Fair, JJ., Concur. James, J., Not Participating.

ISSUE: Whether the trial court erred in dismissing the petition for lack of jurisdiction.

FACTS: Khristoffer Mandell Hearron was convicted in 1995 of possession of cocaine with intent to distribute and sentenced as a habitual offender to thirty years in the custody of the MDOC. Since his incarceration, Hearron has filed numerous claims with the MDOC's Administrative Remedy Program (ARP). ARP policy dictates that only ten claims or motions may sit pending at any one time. In 2013, Hearron filed multiple motions with ARP, including a request for a TRO against MDOC. However, the motions were sent back to Hearron since he already had nine pending motions. Without exhausting administrative remedies, Hearron filed a motion for a TRO against the MDOC and a motion to proceed in forma pauperis (IFP) in the Greene County Circuit Court. The circuit court dismissed Hearron's motion for a TRO for lack of jurisdiction and ordered him to exhaust his administrative remedies. Hearron filed the same motions in Jefferson County Circuit Court. Again, the motions were dismissed

for lack of jurisdiction. Apparently, after several other motions, the circuit court finally granted him IFP status to appeal.

HELD: The record is void of any indication that Hearron has exhausted his administrative remedies. Hearron failed to show that he has followed any ARP appellate procedure to contest the policy itself or petition ARP to allow his motion as an exception. Instead, Hearron immediately filed an appeal with the circuit court and then appealed the circuit court's judgment. Hearron's case is dismissed for lack of jurisdiction. Additionally, Hearron filed in the wrong court. Hearron was incarcerated in Greene County. Jefferson County did not have jurisdiction.

To read the full opinion, click here:
http://courts.ms.gov/Images/Opinions/CO102464.pdf

Michael Ducksworth v. State, No. 2014-CP-00921-COA (Miss.Ct.App. August 18, 2015)

CASE: Murder x2 and one count of Burglary.

COURT: Forrest County Circuit Court
TRIAL JUDGE: Hon. Robert B. Helfrich

APPELLANT ATTORNEY: Michael Ducksworth (Pro Se)
APPELLEE ATTORNEY: Billy L. Gore

DISPOSITION: Dismissal of Petition Affirmed. Fair, J., for the Court. Lee, C.J., Irving and Griffis, P.JJ., Barnes, Ishee, Maxwell and Wilson, JJ., Concur. Carlton, J., Concurs in Result Only Without Separate Written Opinion. James, J., Concurs in Part and in the Result with Separate Written Opinion.

ISSUES: Whether the trial judge erred in treating Ducksworth's petition alleging a due process violation in his denial of parole as a PCR.

FACTS: In 1989, Michael Ducksworth and Ozia Booth pled guilty to two counts of murder and one count of burglary. Twenty years later, Booth was paroled, but Ducksworth was not. This prompted Ducksworth to file a "Petition for Order to Show Cause or In the Alternative, Petition for Writ of Habeas Corpus" in the Forrest County Circuit Court, contending that the Parole Board acted arbitrarily and unconstitutionally when it denied him parole. The circuit court treated Ducksworth's petition as one for post-conviction relief and dismissed it. Ducksworth appealed.

HELD: Ducksworth's petition should have been considered as an ordinary civil action, but regardless, the petition was properly dismissed, as it clearly failed to a state a claim upon which relief can be granted under M.R.C.P. 12(b)(6). Because a prisoner has no liberty interest in obtaining parole in Mississippi, he cannot complain of the denial of parole based on an allegation of a denial of due process.

James, J., Concurring in Part and in Result:

Judge James concurred in the result, but believed the trial court properly treated Ducksworth's petition as a PCR since it was filed in the county where he was convicted and where the State was a party to the action. Although Ducksworth had filed a prior PCR, the trial court was not correct in finding it did not have jurisdiction over this case. The fact that the COA ruled on Ducksworth's first PCR did not deprive the trial court of its jurisdiction to hear a second or subsequent PCR without the party first seeking permission from the Mississippi Supreme Court. Ducksworth failed to provide sufficient evidence that his claims for due process and equal protection fell under an exception to the time bar and successive writ procedural bars.

To read the full opinion, click here:
http://courts.ms.gov/Images/Opinions/CO106965.pdf